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Professor P. H. Winfield, K.C., LL.D., F.B.A., has retired from the editorship of this journal, which he has held for twenty years. The Cambridge University Law Society desire to record their gratitude for all that he has done for them, both as editor and otherwise. They are glad to know that the reason for his retirement is pressure of literary work, and not any abatement of his indefatigable energy. They sincerely hope that there are many years to come in which legal science in general, and this journal in particular, will be enriched by his learning.

Our readers will rejoice that our first editor, Professor A. L. Goodhart, has received the rare distinction of an Honorary Knighthood in the Order of the British Empire, in appreciation of his outstanding devotion to the common interests of Great Britain and the United States, both during and after the war. His services to legal science were recognised some years ago by his appointment as King's Counsel.

JEREMY BENTHAM

FEBRUARY 15, 1748 — JUNE 6, 1832

By H. A. HOLLOND

I. BIOGRAPHICAL

THE current year is the bicentenary of the publication of *L'Esprit des Lois* by Montesquieu, of whom the late Oliver Wendell Holmes, Justice of the Supreme Court of the United States, wrote that he 'influenced, and to a great extent started, scientific theory in its study of societies, and hardly less influences practice in legislation, from Russia to the United States'.¹

The year 1748 also saw the birth of Jeremy Bentham, who, among English lawyers, ranks in world-wide reputation with Thomas More and Francis Bacon.² His name is appropriately commemorated in the Inns of Court by the Bentham Committee, a body of public-spirited barristers who make themselves responsible for organising 'Poor Man's Lawyer' work in London.

Bentham's literary output was immense. A substantial part of it, inaccurately described by the publishers as his complete *Works*, was indifferently edited by Sir John Bowring, with the assistance of several others, and published between 1838 and 1843 in eleven large octavo volumes, unattractively printed in double columns of small type. Mr. C. K. Ogden, who has brought into prominence aspects of Bentham's work which had previously been little known, computes that for a satisfactory edition of his published material at least fifty volumes would be required. And there is besides a mass of unpublished manuscript.

This vast achievement was rendered possible by the fact that Bentham enjoyed a combination of advantages which fate rarely accords to men of genius. He had a well-to-do father,³ who, reluctantly abandoning forensic ambition for his son, was able and willing to support him while engaged in unremunerative work, and, having only one other child, left him half his property. Jeremy was besides endowed with a superb constitution which allowed him to work incessantly, though he had been puny and

¹ *Collected Papers*, p. 264.

² Many of his works were translated into several languages. See Dr. Lipstein's article in the *Symposium*, published 1948 by Stevens, London.

³ The father's fortune was made by judicious investment in land.

weakly as a boy; his approaches to matrimony were frustrated, so that he was not embarrassed by the cares of family life; and, lastly, he found an enthusiastic henchman, Etienne Dumont, who relieved him of the drudgery of publication, and gained for him a continental reputation by making much of his work known in a French text. He also had many other friends who helped him without stint.

Bentham's life may be conveniently divided into five stages: his boyhood and adolescence at Westminster and Oxford until 1767; from 1767 to 1781, his youth at Lincoln's Inn; from 1781 to 1792, the first phase of his middle life during which he made frequent visits to Bowood, and stayed some two years in Russia; from 1792 to 1808, the second phase of his middle life, during which, his father having died, he established himself in the latter's house in Queen's Square Place in Westminster, and was heavily engaged upon his Panopticon scheme; from 1808 to 1832, his late middle and old age, during which he was converted to radicalism and fervently preached its doctrines.

His father, Jeremiah, was an attorney, who was also a scrivener⁴ and clerk to the Scriveners' Company; his grandfather was an attorney; his great grandfather a pawnbroker. All were citizens of London. The child Jeremy's precocity was such as is rarely equalled. It was said of him that he knew his letters before he could speak. He was learning Latin from his father when three years old. At the same age, while still in petticoats, he got bored one day during a walk with his family, ran back to the house, ordered a footman to place Rapin's *History of England* on a desk, and plunged into study.

1755-1767. Age 7 to 19.

At the age of seven he became a member of Westminster School. He lived with a number of other boys in the crowded boarding-house of Mrs. Morel, one of the 'Dames' who, under the system prevalent at Eton and at Westminster, were lessees of houses which they managed with the help of ushers.⁵ In the month before his eleventh birthday his mother died. Her death inflicted a grievous loss upon him, both because she was a charming woman whom he

⁴ 'Scrivener', originally meaning a professional penman, became a synonym for 'notary public', an official, of ecclesiastical origin, who authenticates documents for use in legal proceedings in foreign countries. In the seventeenth and eighteenth centuries scriveners used also to receive money to place out at interest. *H.E.L.* XII, 70-72. Christian, *History of Solicitors*, 141-154.

⁵ Mrs. Morel's house was on the site of the house now called 'Grant's', after another eighteenth century 'Dame'. *Westminster School*, by L. E. Tanner, Keeper of the Muniments of Westminster Abbey, p. 30.

loved dearly and never forgot, and also because he was left without mediator between himself and his father, who was not the most understanding of parents.

In 1760 he went to Queen's College, Oxford, with an underdeveloped body and overdeveloped mind: in 1763 he took his degree. He then spent some time at Oxford as a Bachelor of Arts, and as such attended, during the winter 1763-4, Blackstone's lectures, publication of which, under the title *The Commentaries*, began in the following year. We have his own statement that he heard 'even then no small part of them with rebel ears'.

1767-1781. Age 19-33.

Bentham took his Master's degree in 1766 and left Oxford in the following year. His father, who about that time made a second marriage, settled on him properties worth £103 a year, and also furnished for him chambers in No. 1 Elm Court, fronting the Inner Temple Lane. There he settled down to legal study—not neglecting legal history—for he tells us that he studied Anglo-Saxon law, learning the language for the purpose. He frequented the King's Bench, and was present when Lord Mansfield in 1768 expounded the reasons for the court's reversal of the outlawry of Wilkes. Of Lord Mansfield he wrote, 'From the first morning on which I took my seat on one of the hired boards that slid from under the officers' seats in the area of the King's Bench . . . at the head of the gods of my idolatry had sitten the Lord Chief Justice. . . . Days and weeks together have I made my morning pilgrimage to the chief seat of the living idol'.⁶

One of his earliest appearances in print was in defence of Lord Mansfield, in a letter written to the *Gazeteer* on March 1, 1771, over the signature *Irenius*.⁷ Bentham's own account, given in old age, is as follows⁸: 'Lord Mansfield had been attacked. I was deluded by his eloquence, and fascinated by his courtesy of character. There was an ignorant story of the hanging of forty judges in Alfred's time, taken from one of the most trumpery books that was ever written, namely, the *Mirror of Justices*; and it had been suggested that Lord Mansfield might very properly be made the forty-first. I showed there was no evidence for the story'.

Bentham was called to the Bar by Lincoln's Inn in 1769. But he resisted his father's wish that he should practise, and determined to devote himself to the advocacy of law reform. It has been said

⁶ *Works*, I, 247.

⁷ Apart from some Latin verses written at Oxford on the death of George II, his first publication was a letter in the *Gazeteer* of December 3, 1770, on the enlistment of seamen. Ogden, Appendix I to *Centenary Lecture*.

⁸ *Works*, X, 67.

that his first glimpse into the scandals of legal procedure was the discovery that Masters in Chancery charged for three attendances, when only one was necessary and had been given. But according to Bentham's own account, written it seems towards the end of his life, he had vowed war against the abuses of the law when still a boy. 'Chance threw into my hand, in the year of our Lord 1759, a precious autobiography. Author, in form Paul Whitehead, poet-laureate of that day—in substance and name the then celebrated courtesan, Teresa Constantia Philips. . . . In her sad history, . . . a period of gallantry was closed by marriage'. The indignant relations of the husband persuaded him to repudiate her, and a hireling was suborned to swear to a prior marriage. 'Ding-dong went the tocsin of the law. Tossed from pillar to post was the fair penitent—from Courts Temporal to Courts Spiritual, by Blackstone called Courts Christian: and be it as it may with Christianity in its original form, in this griping, in this screwing, in this eviscerating form—that *Christianity* (as the saying is) *is part and parcel of the law of the land* is but too true. Lengthy of course was the vibration. Particulars of it are not remembered: nor matters it that they should be. What is remembered is—that while reading and musing, the Daemon of Chicane appeared to me in all his hideousness. What followed? I abjured his empire. I vowed war against him. My vow has been accomplished. With what effect will be acknowledged when I am no more. Gratitude to him who deserved well of mankind is never wanting, when to profit by the fruits of it is impossible.'⁹

He took as his touchstone of policy the principle of 'utility', otherwise known as that of the 'greatest happiness of the greatest number'. This concept was not of his own creation, it was part of the *Zeitgeist*, inspired by the philosophy of David Hume (1711–76). He had found it in the writings of Joseph Priestley (1733–1804), theologian and scientist, of the French philosopher Helvetius (1715–71), who published his *De L'Esprit* in 1758, and of the Italian Beccaria (1735–94), whose *Dei Delitti e Delle Pene* appeared in 1764. It was Bentham's championship of the principle of utility which made his name familiar in the nineteenth century to thousands who knew nothing of his many-sided achievements.

The decade of Bentham's life which immediately followed his call to the Bar has been attractively described by Mr. Everett^{9a} in *The Education of Jeremy Bentham*. Incidentally he has unearthed from unpublished manuscripts the previously unknown episode of

⁹ *Works*, X, p. 35. See also VII, 219–220.

^{9a} Charles Warren Everett, Professor of Literature in Columbia University.

Bentham's first love affair with a penniless girl of seventeen, Mary Dunkly, and has movingly told the story of the inevitable conflict between the young man's desire for personal happiness and his wholly unmercenary ambition to benefit his country by the advocacy of law reform.

From 1772 to 1774 Bentham was making a detailed analysis of offences and punishments. His work upon the subject remained in manuscript until it was published by Dumont about forty years later in the *Théorie des Peines*. He was also in his spare time occupying himself with experiments in chemistry and with the education of his young brother Samuel, nine years younger than himself, to whom he was devoted. He also added to his income by translating, on commission, Voltaire's *Le Taureau Blanc*. For this he wrote an introduction which Mr. Everett describes as highly irreverent, treating legal and political matters in the true Voltairian vein.

In 1774 chance diverted him to a critical study of Blackstone's *Commentaries*. At this time his most intimate friend was John Lind (1737-81), through whom indeed he had become acquainted with Mary Dunkly. Lind was an able man who would have become better known if he had not died at the age of forty-four. He had taken holy orders, but had abandoned the clerical profession. He had travelled widely, and had become tutor in Poland to the Polish King's nephew, whom he escorted to London. He then engaged in political writing and was called to the Bar. Among many points of view which Lind and Bentham shared was an antipathy to Blackstone's *Commentaries*, which they regarded as the quintessence of legal self-satisfaction.¹⁰ Lind made a draft of a critical survey of Blackstone's Introduction, and sent it to Bentham for comment. Bentham, fired with enthusiasm, did so much work upon it that he produced what was in effect a treatise of his own. He offered this work freely to Lind, who, generously recognising the superiority of Bentham's competence, made way for him completely. Bentham continued the undertaking so actively that in September, 1775, he could write to his father, 'In spite of chagrin my *Comment on the Commentaries* hastens to a conclusion'. But he never published it. And quite unaccountably

¹⁰ Bentham's attitude was grossly unfair. Blackstone was among the more progressive lawyers of his day. For a balanced estimate of Blackstone see Holdsworth's *H. E. L.*, XII, 702-37. But Bentham candidly expressed his admiration of Blackstone's presentation. 'Correct, elegant, unembarrassed, ornamented, the style is such as could scarce fail to recommend a work still more vicious in point of matter to the multitude of readers. He it is, in short, who, first of all institutional writers, has taught Jurisprudence to speak the language of the Scholar and the Gentleman'.

it was excluded from Bowring's edition of the *Works*. So it remained in manuscript until 1928, when Mr. Everett placed scholars in his debt by his edition of it.

The *Comment* led to the *Fragment on Government*, the conception of which Mr. Everett describes in the following words. 'The *Comment* being almost finished, Bentham went back to consider a point which Blackstone, copying Burlamaqui, had inserted in his discussion of municipal law. This had to do with the nature of sovereignty, and as Bentham considered that it had little to do with the treatment of municipal law, he had at first passed it over with very brief notice. He now examined it more closely. "I sat down", he says, "to give what I intended should be a very slight and general survey of it. The farther, however, I proceeded in examining it, the more confused and unsatisfactory it appeared to me: and the greater difficulty I found in knowing what to make of it, the more words it cost me, I found, to say so." In short, having completed the criticism of Blackstone's Introduction, Bentham entered upon a digression which he treated at length, and which became the *Fragment on Government*.'

The compilation of this comparatively small piece of work was associated with a new intimacy. George Wilson,¹¹ a Scot, who was later a K.C. and leader of the Norfolk circuit, became for a time Bentham's constant companion, and read and discussed his drafts with him. The work progressed rapidly during the winter of 1775-6, and in contrast with most of the author's writings was published without any delay, in April.¹² Having appeared anonymously it created a stir and much speculation. Such men as Lord Mansfield, Dunning, and Lord Camden were suggested as possible authors. Dr. Johnson read it and commended it. Bentham requested his publisher 'for the present not to dissipate so favourable an illusion', but his father could not resist the temptation and revealed the secret.

On a loose sheet at the end of the manuscript of the *Comment on the Commentaries*, Bentham wrote the words, 'Advertisement. Upon the anvil, by a hand concerned in the present publication, *The Elements of Critical Jurisprudence*, commencing with the penal branch of it'. The reform of criminal law was interesting intellectual men in various countries. The *Société Économique de Berne* had just offered a prize for the best project for such reform:

¹¹ There is no biography of Wilson in the *D.N.B.* There is an account of him in *Works*, X, 133, and of his death in 1816 in X, 487. It appears from a letter (*Works*, X, 247) that Wilson was junior to Bentham.

¹² The year of publication, 1776, is, of course, a notable one, being that of the American Declaration of Independence, and of the publication of Adam Smith's *Wealth of Nations*.

the Polish Diet had declared for a revision and codification of criminal law: D'Alembert wrote to Bentham in June, 1778, 'It is indeed high time that the human race should be freed from all the absurdities, or rather, all the atrocities of our criminal jurisprudence; and if we may not speedily hope to see this great change, it is a happiness for which philosophers like you are preparing the way by your writings—useful as they are to society, and honourable to yourself'.¹³

The labour, which Bentham's 'advertisement', so called, heralded, produced a great quantity of manuscript, in which Dumont subsequently quarried, but which was never published as a single unit. A by-product of it was the publication, in 1778, of the tract *Observations on the Hard Labour Bill*. This Bill had been drafted by William Eden with the help of Blackstone to meet a problem which had been forced upon the notice of Parliament by the loss of the American colonies as an outlet for transportation, and by the publication in 1777 by John Howard (1726–1790) of his book on the state of the prisons. Bentham welcomed the Bill as a whole, expressing his 'delight at seeing symptoms of ever so little a disposition to improvement, where none at all were to be expected'. His criticisms of details were well received by Blackstone, who sent him a polite note on the subject, saying that 'some of the observations had already occurred to the patrons of the Bill, and that many more were well deserving their attention'. The reaction of the over-sensitive Bentham was to see in this note a 'frigid caution characteristic of the writer'.¹⁴ There was no further contact between the two men: Blackstone died in 1780, at the age of fifty-seven.

The crowning achievement of Bentham's early maturity was the production of his *Principles of Morals and Legislation*. This has perhaps been in the long run the most read of his writings. It was printed in 1780, but the author's inhibition against publication got the better of him and he put the sheets away. After his return from Russia he yielded to the importunity of Wilson and published the book, in 1789. A second edition revised by him was issued in 1823; it was reprinted by the Oxford University Press in 1907. The book was intended as Part I of a larger work, but no Part II was published, or even printed, until Mr. Everett constructed a sequel out of the confused mass of manuscripts and produced it, in 1945, under the title *The Limits of Jurisprudence Defined*.

¹³ *Works*, X, 87.

¹⁴ *Works*, I, 255.

1781-1792. Age 33 to 44.

The *Fragment* brought to Bentham a piece of unforeseeable good fortune, his friendship with William Petty,¹⁵ second Earl of Shelburne (1737-1805), one of the ablest aristocrats of the day. This was the Shelburne who was Secretary of State for the southern department from 1766 to 1768, under Chatham; was Prime Minister for a few months in 1782 and 1783; and was created Marquis of Lansdowne by Pitt in 1784. There had been correspondence between him and Bentham in 1779 when, at the instance of a common friend, he gave letters of introduction to Samuel. The latter, who had become an engineer, was seeking a career in Russia, where the Empress Catherine was offering patronage to philosophers and scientists. But Shelburne and Bentham had not then met. It is probable that subsequently someone called Shelburne's attention to the *Fragment*, and to the possibility that its author might be useful as a pamphleteer. However that may be, Shelburne called at Bentham's chambers, which were then in Lincoln's Inn, and invited the young man to stay at Bowood, his country seat in Wiltshire. The visit was a great success, the whole family, both men and women, found Bentham congenial, and he returned there repeatedly during the next ten years. Why his visits then ceased is not certainly known; one may reasonably accept the conjecture that an embarrassment had been created by his developing an affection for one of the ladies of the house¹⁶ which was greater than hers for him. Bowood brought to him many contacts and friendships.

The two and a half years between August 1785 and February 1788 he spent in travelling to and from Russia, and in staying with his brother in the Ukraine. Samuel had entered the service of Prince Potemkin, who had been the Empress Catherine's lover, and was still her Minister. There Jeremy wrote his *Defence of Usury*, which was published in England in 1787, and was hailed by the *Monthly Review* as a 'gem of the finest water'. Adam Smith, whose views were attacked, said he thought the criticisms valid, and, shortly before his death in 1790, sent Bentham a copy of his works as a token of his regard.

Upon his return from Russia Bentham began his intimacy with

¹⁵ William Petty's father, John FitzMaurice, who was created Earl of Shelburne, was second son of the twenty-first Lord, and first Earl, of Kerry. On succeeding to the Petty estates from a maternal uncle John FitzMaurice assumed the surname Petty. In 1818 the third Lord Lansdowne on inheriting the Earldom of Kerry from a cousin resumed the surname FitzMaurice.

¹⁶ Caroline Fox, daughter of the second Lord Holland, and niece of Lady Lansdowne. Bentham proposed to her by letter in 1805, a few months after Lord Lansdowne's death. He wrote to her again when a very old man and was greatly hurt by the curtness of her reply.

Samuel Romilly, whom he knew already, and his literary association with a new friend, Etienne Dumont. The meeting with the latter, who had been tutor to Lord Lansdowne's sons, was at Lansdowne House, at a dinner at which Romilly was also present. Dumont was a Swiss clergyman from Geneva: Romilly had met him there in 1781. Dumont had subsequently left Geneva on account of political troubles and had become for eighteen months pastor of the French Protestant Church in St. Petersburg. He was an enthusiastic and painstaking man, and offered to publish in French the substance of Bentham's jurisprudential work. Thus began one of the strangest of literary partnerships, which bore abundant fruit in a series of French treatises between 1802 and 1828.

From 1788 to 1792 Bentham was in close touch with Paris through Romilly, Dumont and Brissot.¹⁷ Romilly had friends there, particularly Mirabeau, of whom he wrote, in his autobiography, a striking appreciation. Dumont was in Paris from 1789 to 1791, seeing Mirabeau daily and furnishing him with materials for his speeches, derived from the writings of Bentham. Brissot had been in exile in London, and had become a great friend and admirer of Bentham. The latter contributed to the cause of the revolutionists two writings. One was *Political Tactics*,¹⁸ the essential parts of which were printed and shown to the French leaders. Dumont wrote that both M. de Mirabeau and the Duc de la Rochefoucauld had expressed admiration of its 'truly philosophical conception'. The other was the *Draft of a Code for the organisation of the judicial Establishment in France*, with critical observations on the draft proposed by the National Assembly Committee.¹⁹ A hundred copies were sent to the President of the Assembly, and Lord Lansdowne in a letter to the Duc de la Rochefoucauld described the author as 'by a hundred degrees the most capable person in the country to judge of the subject'. On August 26, 1792, at the instigation of Brissot, the National Assembly included Bentham in a small group of foreigners upon whom the title of Citizen of France was conferred in recognition of their services to the cause of liberty.²⁰

1792-1808. Age 44 to 60.

The year 1792 is marked by Bentham's succession, on the death of his father, to the estate of Queen's Square Place in Westminster,

¹⁷ Guillotined as a Girondist in 1793.

¹⁸ Published in French by Dumont in 1816. The English version is in *Works*, II, 299-373.

¹⁹ *Works*, IV, 285-406.

²⁰ The group included among others Washington, Priestley and Wilberforce.

which was his principal home for the rest of his life.²¹ The years which followed were much occupied, and marred, by a voluminous correspondence about his Panopticon scheme. This was based on an architectural idea of his brother for the construction of a model factory. The Panopticon was to be a circular prison building with cells on every story of the circumference and a lodge in the centre for the inspector who would be able to see all the prisoners without himself being seen.

Bentham's proposal received support at first; the Government made a contract with him and gave him a grant to enable him to take charge of a large number of convicts. But opposition developed and eventually the Government repudiated its contract. In 1813 Parliament voted £23,000 to Bentham as compensation for his outlay.

Mr. Ogden wrote in 1932 that Bentham's plan, though it has in this country and in Europe been 'consigned to the limbo of eccentric infelicities', gained the support of many of the most practical administrators of his day, and was adopted with enthusiasm in many parts of the New World. It was very appropriate that there should appear in the *Illustrated London News* a hundred years after Bentham's death an account of the Cuban Penitentiary which is, Mr. Ogden says, to all intents and purposes a model Benthamic Panopticon. 'It consists of circular cell houses, each with galleries of doorless cells which are watched from a central guardhouse. In the centre is the dining-hall and kitchen. Over 3,000 convicts are at present serving in it.'²²

How sad the story was is told by Mr. Everett in the following words.²³ 'The result was failure, though with an ironical twist. Bentham's attempts to apply his principles to existing institutions were all failures. If applied at all, they were to be applied in places remote in time and space from Bentham's world. Joliet Penitentiary in the State of Illinois, U.S.A., constructed in 1920, is an exact replica of the architectural plan of the Panopticon, even to central heating and water supplied to each cell. In Central America the imposing name of Panopticon is given to even the humblest one-roomed gaol, though none of them bears any relation to Bentham's plan beyond the use of the name. But in England neither name nor architecture has been used, yet Bentham threw away the best part of twenty years of his life in advocating the scheme. Wilberforce, in 1795, described "poor Bentham . . . dying

²¹ In his later years he used to refer to the house as the *Hermitage*, and himself as the hermit.

²² *Centenary Lecture*, Appendix.

²³ *The Education of Jeremy Bentham*, 178.

of sickness of hope deferred". "Never was anyone worse used than Bentham", he wrote later, "I have seen the tears run down the cheeks of that strong-minded man, through vexation of official underlings, when, day after day, he was begging at the Treasury for what was, indeed, a mere matter of right." The Government had given him enough in the way of promises to justify his buying a tract of land and starting construction. At last, in 1812, the Government finally refused to carry out the plan, but acknowledged Bentham's claim to recompense, and came down with a settlement of £23,000 in cash. Bentham was not to be allowed to benefit his country, but he was to receive money enough to triple his income. Small wonder if he said afterwards, "I cannot look among Panopticon papers, it is like opening a drawer where devils are locked up", and wryly noted that he was 'Condemned to join the Baal Peor of bloodsuckers'.'

Simultaneously the partnership with Dumont was in active progress. The latter expanded the *Introduction to the Principles of Morals and Legislation* with a great deal of manuscript material into a three-volume work, referring by correspondence to Bentham for the elucidation of obscurities. Mr. Ogden quotes an expression of playful exasperation by Bentham in a letter written in 1795—'The plan was that Dumont should take my half-finished manuscripts as he found them—half English, half English-French—and make what he could of them in Genevan French, without giving me any further trouble about the matter. Instead of that, the lazy rogue comes to me with everything that he writes, and teases me to fill up every gap he has observed.'²⁴

The title of the first Bentham-Dumont treatise was *Traité de la Législation Civile et Pénale*, published in Paris in 1802. It rapidly became a classic throughout the world. Two eminent Russians wrote enthusiastically to Bentham's brother, one of them describing Jeremy as 'one of the four geniuses who have done, and will do, most for the happiness of the human race, Bacon, Newton, Smith and Bentham: each the founder of a new science: each a creator'.²⁵

A translation of this treatise was published in Boston in 1830 by John Neal, an American, who had lived in Bentham's house for a time. The other English version, much better known, was also made by an American, Robert Hildreth (1807-1865), lawyer and journalist. It was published in 1864, and became the principal medium of acquaintance with Bentham's thought. There is a modern edition of this translation, with introduction and notes by

²⁴ *Theory of Legislation*, 1931, p. xxxii.

²⁵ Quoted by C. K. Ogden, *Theory of Legislation*, 1931, p. xxxiv, *Works*, X, p. 555.

Mr. Ogden, in the International Library of Psychology, Philosophy, and Scientific Method.²⁶

1808-1832. Age 60 to 84.

The last period of Bentham's life saw no abatement of his intellectual energy. It may conveniently be regarded as dating from 1808 when he reached the age of sixty and began his intimate friendship with James Mill.

James Mill, the historian of British India, was the ablest of the early Radicals, and the most effective exponent of utilitarianism. When he first met Bentham he was thirty-five years old. He and his family first stayed with Bentham in the summer of 1809, at an old manor house near Oxted. Next year Bentham leased to Mill premises adjoining his own garden in Queen's Square Place. And when, from 1814 to 1818, Bentham was tenant of Ford Abbey, a large mansion near the meeting point of Dorset, Somerset, and Devon, the Mill family were his guests there during six months of each year.

Bentham's activities from the age of sixty to the end of his life may be grouped under the following headings. First, the continuation of his collaboration with Dumont. Secondly, his work on the law of evidence, with the invaluable help of James and John Stuart Mill. Thirdly, his conversion to radicalism, and his championship of the radical programme of parliamentary reform in England. Fourthly, his enthusiasm for constitutional reform in any country that might be willing to accept his help, and his laborious preparation of his greatest work, the *Constitutional Code*. Fifthly, his promotion of educational projects, and his writings on kindred topics.

Dumont returned to his native Geneva when it regained its independence in 1814. He became the leader of its supreme council, and introduced many improvements into its judicial and penal systems. He continued his collaboration with Bentham, the successive publications in the series being, *Théorie des Peines et des Récompenses*, 1811; *Tactique des Assemblées Législatives*, 1816; *Traité des Preuves Judiciaires*, 1823; *De l'Organisation Judiciaire et de la Codification*, 1828. He died in 1829 at the age of seventy.

Bentham's work on evidence was made available by the two Mills in English and by Dumont in French. The *Introductory View of the Rationale of Evidence* was prepared by James Mill in 1812, and printed in part.²⁷ More than one bookseller declined publication,

²⁶ *The Theory of Legislation*, 1931, Kegan Paul & Co.

²⁷ Atkinson, p. 223. It occupies pp. 1 to 187 of Vol. VI of the *Works*. There is no reference to any earlier publication.

for fear of its being regarded as libellous. Dumont's work appeared in 1823.²⁸ In 1825 John Stuart Mill, then aged nineteen and a junior clerk in the India House, spent the whole of his leisure reducing to unity Bentham's masses of manuscript on the subject. The result of his labour was the *Rationale of Judicial Evidence* published in five volumes in 1827.²⁹ Sir Leslie Stephen wrote of it,³⁰ 'It is not only one of the richest in matter of Bentham's works, but one of the best edited. It would be difficult to mention a youth of twenty who ever completed such a task in the intervals of official labours'. In the Preface, called the 'prospective view', Bentham states the three results which he hopes to have achieved. First, the proof of the theorem, 'that, merely with a view to rectitude of decision, to the avoidance of the mischiefs attached to undue decision, no species of evidence whatsoever, willing or unwilling, ought to be excluded'. He admits other grounds for exclusion, namely, the avoidance of vexation, expense and delay. Secondly, the giving of 'instructions pointing out the means by which what can be done may be done towards securing the truth of evidence'. Thirdly, the giving of 'instructions serving to assist the mind of the judge in forming its estimate as to the probability of truth, in the instance of the evidence presented to it; in a word the judging of the weight of evidence'.

James Mill converted Bentham to radicalism and secured the active support of his pen. The latter wrote and printed in 1809 a vigorous tract entitled *Elements of the Art of Packing as applied to Special Juries: Particularly in Cases of Libel Law*.³¹ Romilly persuaded him not to publish it, convincing him that the Attorney-General would certainly prosecute.³²

In 1810 Bentham became acquainted with Major Cartwright, the apostle of Universal Suffrage, and accepted the doctrine. He prepared a *Catechism of Parliamentary Reform*, and sent it to William Cobbett, editor of *The Political Register*, who refused to publish it. It was published in 1817, with a long Introduction

²⁸ Atkinson states that an English version of the *Traité des Preuves Judiciaires* appeared in 1825.

²⁹ *Works*, VI, 188 to end, and the whole of Vol. VII. There is a reference (VI, p. 203) to the original editor, but no indication as to his identity.

³⁰ *D.N.B.*, John Stuart Mill.

³¹ *Works*, V, 61-186. It was first published in 1826. The advertisement to the first edition states, 'This work was printed many years ago. Circumstances prevented its being at that time exposed to sale. In regard to the author, all that need be said is—that it was not by him that it was then kept back; and that it is not by him, or at his instance that it is now put forth.'

If, on either accounts, it were desirable that the causes of its being thus long withheld should be brought to view, those causes would afford a striking illustration of the baneful influence of the principles and practices it is employed in unveiling, and presenting in their true colours'.

³² *Works*, X, 450.

purporting to show 'the necessity of radical, and the inadequacy of moderate, reform'.³³ Francis Place described it as having produced a great sensation.³⁴

In 1818 Henry Bickersteth (afterwards Lord Langdale, M.R.), an ardent advocate of parliamentary reform, persuaded Bentham to prepare a series of resolutions,³⁵ for Sir Francis Burdett to move in the House of Commons. Bentham insisted, against Burdett's inclination, on adding a resolution in favour of the ballot, to those in favour of universal suffrage and annual Parliaments. The resolutions³⁶ were moved on June 2 but received no support from the Whigs; indeed Henry Brougham spoke against them. A few days later Parliament was dissolved. Romilly, who had long been the leading Whig lawyer, accepted an invitation to stand for the City of Westminster. Bentham wrote a handbill against the candidature of his old friend in support of the radicals Burdett and Kinnaird. Romilly, who headed the poll, felt no resentment, dined with his friend three weeks after the contest, and wrote in his diary, 'though a late I know him to be a very sincere convert to the expediency of Universal Suffrage, and he is too honest in his politics to suffer them to be influenced by any consideration of private friendship'. A few months later this brilliant and humane lawyer, distraught by the death of his wife, died by his own hand.

Next year Bentham published a draft *Radical Reform Bill*,³⁷ with a commentary, and shortly afterwards he wrote, but did not publish, his tract *Radicalism not Dangerous*.³⁸

The radical conviction which guided his political activity in England made him ready to place his services as draftsman at the disposal of any country willing to liberalise its institutions, and inspired the determination with which, as his strength waned, he pursued the self-imposed task of producing a comprehensive code of constitutional law. He had made a slight reference to the subject in an Appendix added in 1789 to the original text of the *Principles of Morals and Legislation*. He there wrote: 'Besides the civil and the penal, every complete body of law must contain a third branch, the constitutional. The constitutional branch is chiefly employed in conferring, on particular classes of persons, powers to be exercised for the good of the whole society, or of considerable parts of it, and prescribing duties to the persons invested with

³³ *Works*, III, 433-557.

³⁴ Wallas' *Life of Place*, p. 127.

³⁵ *Works*, X, 492-495.

³⁶ Printed in *Works*, X, 495-497.

³⁷ *Works*, III, 558-597. For the date see statement in *Radicalism not Dangerous* that the draft Bill was published on December 6, 1819. *Works*, III, 599.

³⁸ *Works*, II, 599-622.

these powers. The powers are principally constituted, in the first instance, by dis-coercive or permissive laws, operating as exceptions to certain laws of the coercive or imperative kind. Instance: A tax-gatherer, as such, may, on such and such an occasion, take such and such things without any other title'.³⁹

But, apart from his support of Parliamentary reform in England it was not until he had turned seventy that he devoted himself seriously to constitutional law.

In 1820 he wrote four *Letters to the Spanish People* against a proposed law fettering liberty of speech, and in the same year three *Tracts on Spanish and Portuguese Affairs*, the object of one of which was to argue the uselessness and mischievousness of a House of Lords. It should be observed that he intended his single-chamber Parliaments to serve for one year only.

In 1821 the Cortes of Portugal accepted his offer to prepare a code of laws⁴⁰: this encouraged him to publish in 1822 his *Codification Proposal addressed to all nations professing Liberal opinions*,⁴¹ and in 1823 his *Leading Principles of a Constitutional Code*.⁴² It was not until 1827 that a part was published of the monumental *Constitutional Code*⁴³ itself, which Redlich describes as a 'marvel of lucidity, in spite of many strange pedantries of language and method'.⁴⁴ As printed in the *Works* the code is in two Books. Book II is what Bentham intended as the code: the first nine chapters of it were published in 1827, the tenth chapter in 1830, the rest posthumously in the *Works*. What appears as Book I is a series of chapters of a general character which Bentham intended as an introductory dissertation. He worked hard upon his code until the end. Three weeks before his death he described himself as 'codifying like any dragon'. This side of his work brought him an immense foreign correspondence, especially with public men in South America, where his books had a wide sale. When he died the Federal Congress of Central America went into mourning, upon the motion of his disciple Don Jose del Valle, its late President.⁴⁵

I do not know how far Bentham's advice bore actual fruit in the text of South American constitutions. I believe that the question has never been investigated in detail. There is evidence in plenty

³⁹ *Works*, I, 153.

⁴⁰ In 1822 the Cortes decreed the translation of Bentham's works into Portuguese, at the public expense. *Works*, XI, 20.

⁴¹ *Works*, IV, 535.

⁴² *Works*, II, 267.

⁴³ *Works*, IX; Book I, 1-145; Book II, 146-648.

⁴⁴ *Local Government in England*, English edition, 1903, by Redlich and Hirst, p. 53.

⁴⁵ Ogden, *Centenary Lecture*, 9.

as to the veneration with which he was regarded by foreign statesmen, but I am sceptical as to the extent to which they put his views into practice. He was an autocratic adviser, and disposed to brush aside in a high-handed manner suggestions made by his clients for the adaptation of his propositions to local conditions. It would not be unnatural for such intransigence to end in a rejection of his proposals. Dr. Lipstein, in his article for the bicentenary symposium mentioned below,^{45a} has sought light on this subject in the unpublished correspondence. His data are interesting, but not sufficiently precise or numerous to justify his submitting any positive conclusion.

Though Bentham enjoyed in his lifetime wider recognition abroad than at home, he was not wholly a prophet without honour in his own country. To a large circle of able friends of all ages he was an inspired sage, and in the outer world he was awarded the highest distinction which his professional brethren could confer upon him. It is to the credit of the Masters of the Bench of Lincoln's Inn that in 1817 they elected him to be one of their number.⁴⁶ For it was unusual for a member of the Inn, not in actual legal practice, to be so honoured, unless he was politically eminent. It was a generous act, for the Benchers of that time were probably not of radical sympathies, or interested in law reform, and many of them must have heard of, and been irritated by, some of the numerous criticisms of unrestrained violence, which Bentham had uttered about lawyers in general.

There remain to be noted Bentham's activities in fields other than law. James Mill's circle included Francis Place, who became a close friend of Bentham, and stimulated his interest in education. A movement for the diffusion of elementary education had been started by Andrew Bell and Joseph Lancaster, who at the very end of the eighteenth century had, independently it seems, in Madras and London respectively, conceived the idea that primary education could be provided cheaply by making the older boys teach the younger. In and about 1814 Place was enthusiastically canvassing the possibility of establishing a system of schools giving secondary education by the same method. His hopefulness was increased by the news that it had been successfully used in two Scottish schools. Mill threw himself wholeheartedly into the scheme, and Bentham

^{45a} See penultimate, para 2, Part III, *Bibliographical Notes*.

⁴⁶ I was sorry to read a statement made by Bentham that he left the invitation unanswered for several weeks. At the time of going to press I cannot find the reference. The resolution offering him election was passed on June 25, 1817; the date of election was December 10, 1817. The Treasurer (i.e., the annual Head of the Society) for that year was Henry Martin, K.C.: *Black Books of Lincoln's Inn*.

impulsively promised a site in his garden for a pioneer secondary school. But things went wrong with the West London Lancastrian Association, of which Place was a key member, and money flowed in very slowly for the higher school. Bentham came to see how very disagreeable for himself a school in his garden would be, and imposed discouraging conditions. Fortunately for the peace of his last years the project was abandoned. But it had produced his *Chrestomathia*, which derives its title from the roots of Greek words meaning 'useful' and 'learning'. There were several editions of this treatise, the first edition of which was seen through the press by Place in 1815.⁴⁷ It is a tract which no one would read unless prompted by some very compelling motive. But there are modern touches, such as the statement that 'every task may be converted into play if the taskmaster be but properly acquainted with his business'.⁴⁸ And Bentham was among the first to realise the importance of giving some part of school time to the natural sciences instead of virtually the whole of it to Latin and Greek. 'In knowledge in general, and in knowledge belonging to the physical department in particular, will the vast mass of mischief, of which perverted religion is the source, find its preventive remedy. It is from physical science alone that a man is capable of deriving that mental strength and that well-grounded confidence which renders him proof against so many groundless terrors flowing from that prolific source. . . .'⁴⁹

Appendix IX of the *Chrestomathia* is headed: 'Hints towards the composition of an elementary treatise on universal grammar, or a new principle on which that branch of art and science may, it is supposed, be capable of being taught and learned with advantage and facility towards the end of a *Chrestomathic* course'.⁵⁰ This is closely connected with the other writings, dating from the same period of Bentham's life but not then published, which are included in Volume VIII of the *Works*. Their titles are: *A Fragment on Ontology*; *Essay on Logic*; *Essay on Language*; *Fragments on Universal Grammar*.

Bentham's enthusiasm for education found further scope in the movement towards a new University which should be free from the clerical influence that, in his opinion, paralysed Oxford and Cambridge. The foundation stone of University College was laid in 1827; its site abutting on Gower Street having been bought in the previous year. It bore the title 'University of London' until

⁴⁷ Wallas, *Life of Place*, 84.

⁴⁸ *Works*, VIII, 12.

⁴⁹ *Works*, VIII, 13.

⁵⁰ *Works*, VIII, 185.

King's College was constituted a few years later. University College honours Bentham with its founders, as having been a member of the first committee for its promotion; it treasures his effigy; and it houses most of his voluminous manuscripts.

It is worth while to mention among the incidents of Bentham's old age the foundation, financed by him, of the Radical *Westminster Review* in 1823, to balance the Whig *Edinburgh* and the Tory *Quarterly*; his attacks on the Tory Chancellor Lord Eldon and the Whig Chancellor Lord Brougham; and his visit to Paris after an interval of so many years.

John Scott, Earl of Eldon, had been Chancellor since 1801, with an intermission of one year only. His integrity and his ability were unquestioned. But with advancing years the habit of indecision grew upon him, and the arrears of his court became notorious. He also showed complete indifference to the abuses which were rampant behind the scenes in Chancery procedure. It became an annual event for a resolution praying inquiry into the state of the court to be moved in the House of Commons by Michael Angelo Taylor, whom the nickname Chicken Taylor shows to have been not the most effective of critics.

In February, 1824, a more redoubtable champion, John Williams, afterwards a judge, took up this task. Lord Eldon asked Peel to defend him. Peel did so with skill, but announced that a commission would forthwith be appointed to report on the court. As Lord Eldon himself was made chairman it is not surprising that the commission did not report until February, 1826, and then only after repeated insistence on the part of the Prime Minister, Lord Liverpool. In the meantime Bentham had joined in the fray with a pamphlet entitled *Indications respecting Lord Eldon*.⁵¹ In it he made fun of 'Mr. Peel's stream of eloquence' and of the commissioners as 'commissioned by Lord Eldon to report with Lord Eldon on the conduct of Lord Eldon'. The whole document was virulent, as may be inferred from the title of one of the sections, 'How the Head of the Law, seeing swindling at work, continued it, and took his profit out of it'.⁵² It is not surprising

⁵¹ *Works*, V, 348-382. According to X, 542, publication was in 1824, but it appears from the pamphlet itself that it was in 1825.

⁵² The following is an amusing example of Bentham's vitriol. It is taken from a 'Postscript', which was evidently not published with the original pamphlet. The passage, p. 377, is headed 'Lord Eldon Squeaking'. Lord Eldon is represented as answering a speech in the House of Lords, by Lord Grosvenor, on sinecures.

'Whereupon, up rises Lord Eldon, finger in eye, answering Lord Grosvenor's digression, with a digression on calumny and firmness. Addresses, two: one to the people, the other to noble lords. For better intelligibility, behold these same addresses, in the first place, in plain English: after that, for security against misrepresentation, in Lord Eldonish.

that his legal friends had implored him not to publish: in fact, no proceedings were taken against him.

Later in the year in which this pamphlet was published, 1825, Bentham revisited Paris for medical consultations. In Halévy's words it was his *voyage triomphal*, for he was made much of by distinguished people. On one occasion when he entered a law court all the barristers present rose to welcome him, and the president placed him by his side.

Henry Brougham, who was born in 1778, had had a brilliant career at the Bar and in Parliament, where he was a prominent opponent of the slave trade. Although he was not trusted by the Whig Lords he had made himself indispensable to them, and on the occasion of the Whig victory at the polls in 1830 they were obliged to make him Lord Chancellor. He had been a friend of Bentham since about 1810, though with reservation on the latter's part according to Bowring, who reported the remark, 'insincere as he is, it is always worth my while to bestow a day on him'.⁵³ Bentham was irritated by Brougham's lack of support of some of his proposals, such as the ballot, which, strange though it may seem to us, were regarded as radical. And Brougham had

'1. *Lord Eldon to the people, in plain English*.—Have done! have done! Let me alone! Nay, but don't tease me so. You had best not; you won't get anything by it. This is not the way to get me out, I can tell you that. Come now, if you will but let me alone, I'll go out of my own accord. I should have been out long ago, had it not been for you. It's only your teasing me so that keeps me in. If you keep on tease, tease, I'll never get out: no, *that* I won't'.

'*The original in Lord Eldonish*.—"Perhaps it is thought that this mode of calumnious misrepresentation is the way to get me out of office. They are mistaken who think so; I will not yield to such aspersions; nor shrink from asserting what I owe to myself. Had I been treated with common justice, I should not, perhaps, have been Lord Chancellor this day; but, I repeat it, I will not be driven out of office by calumnious attack. Let me only be treated with common justice, and my place shall be at *any man's disposal*!"'

'2. *Lord Eldon to Lordships in plain English*.—Help! help! help! Going, going! Can't stand it any longer. What! nobody lend me a hand?—nobody speak a word for me? Do not you see how it is with me? What! and will *you* turn against me? Better not: I can tell you *that*. You'll be all the worse for it. When I am put down, it will be your turn next. What will become of your privileges?—think of that! I'll tell you what, so sure as they take away my seals, so sure will they take away your privileges.

'Squeaking, staggering, blustering, crying out for help—all in a breath! What an exhibition!'

'*Original in Lord Eldonish*.—"The feelings and fate of an individual are in themselves of small importance to the public, and I may be sacrificed to the insults I daily receive. But I beg noble lords to reflect, that I may not be the only sacrifice. If the object is, as it appears to be, to pull down the reputation, and throw discredit on the motives and conduct of men in high official situations,—if every man who occupies a high situation in the church" [turning, of course, to the bishops' bench] "in the church or state, is to become the object of slander and calumny, then your lordships may lay your account with similar treatment, and be convinced that your privileges or power cannot long be respected, when such characters have been sacrificed"'.
'N.B. At what words the tears began to flow is not reported. When a crocodile comes on the stage—*Tears, tears*, should be added to the *Hear! Hears!*'

⁵³ *Works*, X 571.

opposed Burdett's reform motion. But the correspondence between them was friendly and even playful. In September, 1827, Brougham wrote to Bentham telling him of his intention to propose the appointment of a common law commission. Bentham wrote back enthusiastically.⁵⁴ The great day came on February 7, 1828, when Brougham delivered a six hours' speech setting forth the anomalies and defects of the law of real property and proceedings at common law. But there was no express recommendation of some of Bentham's cherished notions, and the latter was bitterly disappointed. Two days later he wrote,⁵⁵ 'Mr. Brougham's mountain is delivered, and, behold!—the mouse. The wisdom of the reformer could not overcome the craft of the lawyer. Mr. Brougham after all, is not the man to set up a simple, natural, and rational administration of justice against the entanglements and technicalities of our English law proceedings'.

In 1831, Brougham having become Chancellor and having cleared off arrears in his court, announced his intention to hear at first instance a great many cases of the kind previously heard either by the Master of the Rolls or by the Vice-Chancellor. He also promoted the Bankruptcy Court Bill, which was duly passed in that year. Bentham approved neither the announcement nor the Bill, and let himself go in an effusion, which he published within a few months of his death, entitled *Lord Brougham Displayed*. He did indeed describe the Chancellor as 'one of the most admirable members this country ever saw of the most highly talented profession—one of the most amiable men I can think of in private life', but on the other hand he did not scruple to suggest that his friend was prompted by a desire for patronage and that 'there was some sinister design, and, in particular, some *fee-gathering* design, for assuaging his hunger and thirst after—what shall we say?—not *righteousness*, but the mammon of *unrighteousness*'.⁵⁶

It is pleasant to read that Brougham, defending himself, took no umbrage at the criticism, but described the author as 'a personal friend of mine—a man of extraordinary learning, the father of the English Bar, and the father of law reform'.⁵⁷

In old age Bentham was fortunate in enjoying the services and inspiring the affection of a number of much younger men, notably Bowring, Southwood Smith and Chadwick. John (later Sir John) Bowring (1792–1872), a considerable linguist and writer, was Bentham's most beloved protégé, and was charged with the care

⁵⁴ *Works*, X 574.

⁵⁵ *Works*, X 588.

⁵⁶ *Works*, V, 577.

⁵⁷ Atkinson, 185.

of his manuscripts. Thomas Southwood Smith (1788-1861), to whom Bentham entrusted the task of having his body dissected, was a unitarian minister, a doctor of medicine and pioneer in sanitation. Edwin (eventually Sir Edwin) Chadwick (1800-1890), who became a civil servant and founded modern public health law, was Bentham's devoted secretary, and derived much inspiration from him.

Death came peacefully to Bentham the day before the great Reform Bill received the Royal Assent. His last thought was characteristic of the benevolence which inspired his life. 'I now feel that I am dying; our care must be to minimise pain. Do not let the servants come into the room, and keep away the youths, it will be distressing to them, and they can be of no service'.⁵⁸

There could hardly be an epitaph more appropriate to Bentham than a quip of his old friend Talleyrand, who revisited him shortly before his death. Bowring remarked that from no modern writer had so much been stolen without acknowledgment. Talleyrand assented, adding, 'et pillé par tout le monde il est toujours riche'.⁵⁹

II. COMMENT ON BENTHAM'S WORK

Private and public law; administration.

Bentham's primary rôle was the very unusual one of legal seer. He had a quite extraordinary power of freeing himself from the influences of time and place, of seeing as abuses conventional machinery which his contemporaries accepted uncritically as part of the natural order, of visualising what rules of procedure and evidence should obtain in a perfected legal system. When so learned and judicious a scholar as Dicey has written of him that 'his genius was of the rarest quality', and that 'he was in very truth the first and greatest of legal philosophers' one can have no anxiety lest one's enthusiasm should overrun one's discretion.⁶⁰

To what extent the course of law reform would have been retarded if he had not lived can be but a matter of conjecture. I do not think that Maine⁶¹ exaggerated when he wrote in the middle of the nineteenth century that he did not know a single law reform effected since Bentham's day which could not be traced to his influence. Dicey was of the same opinion a quarter of a century later. 'The name', he wrote, 'of one man, it is true, can never

⁵⁸ *Works*, XI, 95.

⁵⁹ *Works*, XI, 75.

⁶⁰ *Law and Opinion*, 129, 133. I think that Dr. Zane's diatribe in *Great Jurists of the World* may be dismissed as unworthy of attention. Why the editor should have admitted to a volume so entitled a contribution which denied to Bentham the right to be considered a jurist at all I cannot imagine.

⁶¹ *Early History of Institutions*.

adequately summarise a whole school of thought, but from 1825 onwards the teaching of Bentham exercised so potent an influence that to him is fairly ascribed that thorough-going, though gradual, amendment of the Law of England which was one of the main results of the Reform Act'.⁶² The secret of this influence was, in Maine's opinion, that Bentham 'gave us a clear rule of reform. English lawyers of the last (*i.e.*, the 18th) century were probably too acute to be blinded by the paradoxical commonplace that English law was the perfection of human reason, but they acted as if they believed it, for want of any other principle to proceed upon. Bentham made the good of the community take precedence of every other object'.⁶³

Obviously the time came when Bentham's influence was spent. For instance, the fact that the Administration of Estates Act, 1925, deprived the remote relations of an intestate of the right to succeed to his property, and the fact that Grand Juries were abolished in 1933, cannot be attributed to Bentham's advocacy of both these reforms. But the fact that he envisaged them is surely remarkable.

Among the reforms of the civil law which took place when they did because of him the following can safely be included: the provision of county courts; the abolition of fictions from writ process, from the barring of estates tail, and from the action of ejectment; the abolition of arrest in mesne process; the abolition of the usury laws; the removal of exclusionary rules from the law of evidence; the reform of chancery procedure so as to reduce delays; the improvement of the law of patents; the limitation of the liability of investors in industrial enterprises.

In the criminal law such penal science as there is in England begins with Bentham's teaching. It was his reiterated argument which produced a public opinion that refused to tolerate any longer the pillory, the whipping of women, and transportation. But for his efforts and Romilly's the reduction of capital offences to treason and murder would have been still further delayed. But for them we should have had to wait still longer for laws punishing cruelty to animals.

In the field of private law the name of Bentham was during the central part of the nineteenth century invoked in support of legislation favouring individual initiative and securing freedom of contract. The sixth of Dicey's masterly lectures entitled *Law and Opinion in England* is headed 'The period of Benthamism or Individualism'. In it he states one of the best known of the

⁶² *Op. cit.* 125.

⁶³ *Ancient Law*.

principles associated with the name of Bentham in the following terms.⁶⁴ 'Every person is in the main and as a general rule the best judge of his own happiness. Hence legislation should aim at the removal of all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbours'. No doubt Bentham believed this. But I think he would have approved unreservedly Dicey's statement that 'this dogma of *laissez faire* is not from a logical point of view an essential article of the utilitarian creed'. And he would not, I think, have been opposed, as were many who regarded themselves as his followers, to legislative interference with freedom of contract when the parties are of unequal economic strength, as were employers and employees in the nineteenth century.

In the field of constitutional law the learned foreign scholar already mentioned, who made a profound study of our local government, testifies to Bentham's influence. It was Bentham, he says, who 'taught the nation that scientific methods and scientific investigations are indispensable if laws are to be made adequate to the needs of a modern industrial society. A great series of reforms followed his death; and of them none were more Benthamic in the best and truest sense than those which built up the modern system of local government in England'. After extracting from the *Constitutional Code* the main ideas which Bentham desired to apply to the reorganisation of English government, Redlich points out that it is difficult now to realise what a startling revelation these ideas were to his contemporaries, and how great was 'the intellectual force and originality of the man whose doctrines overcame in the course of two generations the spell of tradition, the self-interested opposition of the governing classes, and even the hardy conservatism of the English character'.⁶⁵ Defending against the charge of exaggeration the view of Hill Burton⁶⁶ and Sir Henry Maine⁶⁷ that nearly all the great reforms of the first half of nineteenth century England were originated by Bentham, he concludes, 'but the best and most conclusive evidence of all is to be drawn from a comparison of Bentham's teaching with the legislation which followed it'.

⁶⁴ P. 145.

⁶⁵ Redlich and Hirst, *Local Government in England*, 83-97.

⁶⁶ John Hill Burton (1809-82), historian and economist, assisted Bowring in editing the *Works*. He contributed an introduction of eighty pages to Vol. I. His list of reforms advocated by Bentham is in the 'Advertisement'.

⁶⁷ Henry Sumner Maine (1822-88), one of the greatest jurists of the nineteenth century, was Regius Professor of Civil Law at Cambridge, 1847-54; legal member of the Council of India, 1862-9; Corpus Professor of Jurisprudence at Oxford, 1869-78; Master of Trinity Hall, 1877-88; Whewell, Professor of International Law, 1887-8.

This estimate is confirmed by Graham Wallas in the following striking passage: 'Between 1824 and 1832, with the help of Southwood Smith and Chadwick, he wrote his unfinished but amazing *Constitutional Code*, the mine from which a new system of English administration, and a new relation between English central and local government, were extracted in the years that followed the Reform Bill of 1832. From the incompletely printed manuscript of the *Constitutional Code* Chadwick took the details of the New Poor Law of 1834, Parkes and Place the details of the Municipal Reform Act of 1835, Chadwick the details, and even the phrasing of the Act establishing a scientific system of vital statistics in 1836. The whole book was at last printed in 1841, and contained, mixed with some details which seem to us fanciful, schemes, which have since then been carried out, for a logical division of work between the Government departments, for Ministries of Health and Education, and Police, and Transport, in connection with corresponding municipal committees and expert municipal officials, and—most wonderful of all, when one thinks of the patronage arrangements of the time—a Civil Service recruited by competitive examination, access to which was to be made possible to the poorest boy of talent by a great system of educational scholarships'.⁶⁸

The late Professor J. L. Stocks paid a similar tribute in a memorial lecture.⁶⁹ After referring to the law reforms instigated by Bentham as constituting a record of practical productivity probably without record in this or any other country, he said, 'There is a tendency to think of these reforms as mainly negative in character, as consisting in the removal of harmful restraints and inherited abuses. John Stuart Mill's fine essay on Bentham encouraged this view, describing him as 'the great subversive or . . . critical thinker of his age and country'. There is, of course, much truth in this. He was bound to deal with the political problems more or less in the form in which his time set them to him. But constructive elements are not wanting. His contributions to the Census, to Municipal Reform, to the development of the Poor Laws, the Civil Service, and the Post Office, to the foundation of a system of inspection and registration in a variety of fields, show a strong constructive bent in a direction which we are better able to appreciate than Mill was. Few things

⁶⁸ *Men and Ideas*, p. 29. The book, published in 1940, is a collection of articles and addresses by Graham Wallas, edited by his daughter Miss May Wallas. The quotation is from a foundation oration delivered at University College, London, in 1922, and printed in the *Political Science Quarterly*, March, 1923.

⁶⁹ Published by the Manchester University Press, 1933, see pp. 26, 27.

are more significant of this bent than his emphasis on the need in every department of government of full and accurate statistics. We shall not go far wrong if we regard him on his more positive side as the founder of the modern science of administration'.

In this connection the names of Jeremy Bentham and of Edwin Chadwick (who died in 1890 after founding the system of sanitation and public health in this country), should be remembered together in honoured association.

Nor was Bentham without influence upon colonial history. In 1793 he had addressed to the French Government a pamphlet entitled *Emancipate your Colonies*. It was subsequently used in England for circulation among the friends of colonial liberty. As late as 1828 Bentham was drafting a petition in which the Canadians were to ask Parliament for complete separation. But when over eighty he came round to the view that the interests of the colonies would be better served by the adoption of a new principle of self-government within the Empire. Wallas writes, 'He printed a page of retraction to that effect, which he pasted on the remaining copies of his original pamphlet; and six years after Bentham's death his disciples made that principle the basis of that new Canadian polity which soon spread to the other Dominions'.⁷⁰

International Law.

Bentham's writings on International Law—an expression which he coined, using it in his *Principles of Morals and Legislation*,—are meagre. They consist of four essays, the manuscripts of which date between 1786 and 1789. They were first printed in the *Works*, under the title *Principles of International Law*.⁷¹ But they show amazing prescience. For in them are adumbrated the major issues which in modern times have been to the fore in discussions of international affairs. The titles of the essays are: (1) Objects of International Law; (2) Subjects, or the Personal Extent of the Dominion of the Laws; (3) War, considered in respect of its Causes and Consequences; (4) A Plan for an Universal and Perpetual Peace. The last of these is the most important. It begins with the statement that 'the happiest of mankind are sufferers by war; and the wisest, nay, even the least wise, are wise enough to ascribe the chief of their sufferings to that cause. The following plan has for its basis two fundamental propositions: (1) The reduction and fixation of the force of the several nations that comprise the

⁷⁰ P. 31.

⁷¹ Vol. II, 535-60. The first three essays have been summarised, and the last reprinted in full, by Dr. C. J. Colombos in No. 6 of the Grotius Society Publications, 1927.

European system; and (2) the emancipation of the distant dependencies of each State'. He follows this up with the enunciation of fourteen propositions, the last three of which are as follows:—

XII. 'That for the maintenance of such a pacification', *i.e.*, a plan of general and permanent pacification for all Europe, 'general and perpetual treaties might be formed, limiting the number of troops to be maintained'.

XIII. 'That the maintenance of such a pacification might be considerably facilitated by the establishment of a Common Court of Judicature for the decision of differences between the several nations, although such a Court were not to be armed with any coercive powers'.

XIV. 'That secrecy in the operations of the Foreign Department ought not to be endured in England, being altogether useless and equally repugnant to the interests of liberty and to those of peace'.

In his comment he does not face any of the difficulties which make the conduct of foreign affairs the most arduous of practical activities. To him it is in all so simple. 'The dread', he writes, 'of being duped by other nations—the notion that foreign heads are more subtle though at the same time foreign hearts are less honest, than our own—has always been one of our prevailing weaknesses'.

He is optimistic, too, about the enforcement of the decrees of the Common Court, suggesting that the power of the court would consist in putting, after a certain lapse of time, the refractory State 'under the ban of Europe'. 'There might perhaps', he adds, 'be no harm in regulating, as a last resource, the contingent to be furnished by the several States for enforcing the decrees of the court. But the necessity for the employment of this resource will, in all human probability, be superseded for ever by having recourse to the much more simple and less burdensome expedient of introducing into the instrument by which such court was instituted a clause guaranteeing the liberty of the press in each State, in such sort that the Diet might find no obstacle to its giving, in every State, to its decrees and to every paper whatever, which it might think proper to sanction with its signature, the most extensive and unlimited circulation'.

Readers of this extract will make their own comments, each according to his temperament.

Lastly, in view of the duty imposed on the United Nations Organisation by its Charter to encourage the codification of

international law, it is of interest that Bentham, as one would expect, held that few things are more wanting than such a code.⁷²

Economics.—The *Defence of Usury* is a renowned book. Its publication in 1787 has already been mentioned. During the next few years Bentham continued his work on Political Economy; part of it was published in Geneva in a collection of articles by various authors, part much later as the fourth book of the *Rationale of Reward*, which was the English version of the second half of the *Théorie des Peines et des Récompences*. These writings, with material previously unprinted, constitute the *Manual of Political Economy* in Bowring's edition. Bentham himself linked his own name with that of Ricardo in the saying, 'Mill was the spiritual father of Ricardo, while I am the spiritual father of Mill'. This was no exaggeration, for economists regard Bentham as filling a rôle of first rate importance in the history of economic doctrine. Indeed, at the present time the Royal Economic Society has in hand a project for the publication of hitherto unprinted writings on political economy from Bentham's manuscripts. I am informed that the editor, Dr. Stark, has discovered some most important material.

Philosophy and Linguistics.—If Mr. Ogden is right, Bentham is entitled by his work in this field alone to rank among the great thinkers of history, though the neglect of his writings robbed him of the influence which their quality deserved. Halévy referred to them as *longs et inutiles manuscrits*, and others have echoed this description. But his work on fictions anticipated and went beyond Hans Vaihinger's *Philosophie des Als Ob* (1911), which was translated by Mr. Ogden under the title *The Philosophy of As If*. 'The chief defect', says Mr. Ogden, 'of the latter work was its failure to lay stress on the linguistic factor in the creation of fictions'. But Bentham had already emphasised the fact that 'to language alone it is that fictitious entities owe their existence, their impossible, yet indispensable existence'.⁷³

Another living philosopher, Mr. John Wisdom, has given attention to Bentham's work in this field and testifies to its importance. In answer to an inquiry from me he writes, 'I think it fair to say that Bentham anticipated much of what Russell wrote on logical fictions, and also of what Wittgenstein has said about the power of pictures and models in our thinking, even where we do not realise that such models are influencing us. The importance of these models has not yet been fully worked out, much less widely

⁷² *Works*, X, 584.

⁷³ Bentham's *Theory of Fictions*, ed. Ogden, 1932, p. xxxii.

recognised. Their connection with unconscious phantasies should, I think, interest psycho-analysts also'.

And lastly reference must be made to the researches which Bentham was led to make, in connection with his theory of fictions, into the problem of a universal language. Mr. Ogden writes that 'he classified the seventeen properties desirable in a language as a means to linguistic reform. He outlined the principles of a universal grammar. He enumerated the kinds of referents, fictitious and otherwise, for which symbols are required. And finally he gave his reasons for believing that English could be adapted to meet the requirements of international communication, if certain proposals of his met with sufficient support'.

To Bentham, Mr. Ogden gives unreserved credit for various suggestions, especially in regard to verbs—described as linguistic eels—which he has used in his own remarkable creation, Basic English. It has thus befallen Bentham—as it has befallen few others—to receive, a century after his death, a tribute to his memory exactly such as he would have desired.

III. BIBLIOGRAPHICAL NOTES

(1) There is a detailed bibliography, of publications anterior to 1928, prepared by Mr. C. W. Everett. It was published in that year as an appendix of about twenty-five pages to Mary Morris' translation of Halévy's *La formation du radicalisme philosophique*. Faber and Gwyer, London, 1928. The bibliography includes references to some of the literature about Bentham.

Mr. Everett makes use of an earlier bibliography by A. Siegwart, in *Bentham's Werke und ihre Publikation*, an article in *Politisches Jahrbuch der Schweizerischen Eidgenossenschaft*, Vol. 24 (1910), pp. 287–400.

(2) *Jeremy Bentham's Works*, erroneously described by the publisher as 'complete', were published in 1843 by William Tate, of Edinburgh. The general preface is dated 1837. The editor-in-chief was John Bowring, who was assisted by John Hill Burton and others. Vols. X and XI contain a memoir by Bowring with extracts from Bentham's correspondence.

(3) Modern editions of some of Bentham's writings.

A Fragment on Government: ed. F. C. Montague, Oxford, 1891.

An Introduction to the Principles of Morals and Legislation. Reprint, 1907, by the Oxford University Press, of the second edition, 'corrected by the author', which was published in 1823.

Theory of Legislation: translated from the French text of Dumont by C. M. Atkinson, Oxford, 1914.

A Comment on the Commentaries: printed for the first time. Ed. C. W. Everett, Oxford, 1928.

Theory of Legislation: reprint of R. Hildreth's translation (1864), from the French text of Dumont. Ed. C. K. Ogden, London, 1931.

Theory of Fictions: ed. C. K. Ogden, London, 1932.

The Limits of Jurisprudence Defined; being Part II of *An Introduction to the Principles of Morals and Legislation*, printed for the first time. Ed. C. W. Everett, New York, Columbia University Press, 1945.

(4) Some accounts of Bentham's life, works, and influence.

(a) All writers must necessarily draw on the memoir by Sir John Bowring mentioned above.

(b) The following are modern books and articles suitable for elementary reading.

Atkinson,⁷⁴ C. M., *Life of Jeremy Bentham*. London, 1905.

Dillon,⁷⁵ J. F., *Bentham's Influence in the Reforms of the Nineteenth Century*. Reprinted from lectures in *Select Essays in Anglo-American Legal History*, Vol. I, 492. Camb. University Press, 1907.

Everett, C. W., *The Education of Jeremy Bentham*. Columbia University Press, New York, 1931.

Ogden, C. K., *Jeremy Bentham*, a centenary lecture delivered at University College, London, 1932.

Stocks, J. L., *Jeremy Bentham*, the Samuel Hall Oration of the University of Manchester, 1933.

Wallas, Graham. Two articles reprinted in *Men and Ideas*, ed. M. G. Wallas, London, 1940.

Phillipson, Coleman. *Three Criminal Law Reformers: Beccaria, Bentham, Romilly*. London, 1923.

Jennings, Sir W. I., *A Plea for Utilitarianism*, in 2 *Modern Law Review* (1938).

Russell, Bertrand (now Earl), *Freedom and Organisation*, 1934; containing short accounts of the Mills and of Bentham. See also his *History of Western Philosophy*.

(c) The following are for more advanced reading.

Mill, John Stuart, *Bentham*, a paper in Vol. 1 of his *Dissertations and Discussions*, reprinted from the *London and Westminster Review*, August, 1838.

Kenny, C. S., two articles on Bentham's influence on Spanish thought in *Law Quarterly Review*, Vol. 11, 1895, pp. 48, 175.

⁷⁴ Atkinson was a stipendiary magistrate in Leeds.

⁷⁵ Dillon was an American judge and law professor.

Wallas, Graham, *Life of Francis Place*. London, 1898.

Halévy, Elie, *La formation du radicalisme philosophique*, Volume 1 of which is entitled *La jeunesse de Bentham*. Paris, 1901-4. Translation by M. Morris, London, 1928.

Stephen, Sir Leslie, *The English Utilitarians* (Jeremy Bentham, James Mill, John Stuart Mill). London, 1900.

Dicey, A. V., *Law and Opinion*, Lecture 6. London, 1905.

Holland, Sir T. E., article in *Encyclopædia Britannica*, 11th ed.

Macdonell, Sir John, article in *D. N. B.*

MacCunn, J., *Six Radical Thinkers*. London, 1910.

Everett, C. W., introductions to his editions above mentioned.

Ogden, C. K., introductions to his editions above mentioned.

Stone, Professor Julius, Chap. 10 in Part II of *The Province and Function of Law*. Stevens, London, 1947.

Jeremy Bentham and the Law; a Symposium. This volume is being prepared by the Dean and members of the Faculty of Laws of University College, in the University of London, for publication by Messrs. Stevens in the current year. I have read the volume in proof and can warmly commend it to any one whose interests may have been aroused by my article, and who may wish to be further informed upon any of the aspects of Bentham's work and influence to which I have briefly alluded.

Holdsworth, W. S., *History of English Law*. I am informed that Bentham is fully discussed in the posthumous Vol. XIII, shortly to be published.

PRISON ADMINISTRATION

R. M. JACKSON

DURING the war the publication of the ordinary annual reports from government departments, including the Reports of the Prison Commission and the Criminal Statistics, was suspended as a matter of economy. There have now been published Prison Commission Reports for 1939 to 1946¹ and Criminal Statistics in an abridged form for 1939 to 1945.² A new and most welcome step has been the publication in 1945 of a booklet *Prisons and Borstals*, described as a 'statement of policy and practice in the administration of prisons and Borstal Institutions in England and Wales'.³

Prisons and Borstals begins by saying that 'the governing principles of the contemporary prison system are based on the report of the Departmental Committee on Prisons of 1895, presided over by the late Lord Gladstone'.

Soon after that report was presented the Home Secretary (Mr. Asquith) appointed Sir Evelyn Ruggles-Brise to the chairmanship of the Prison Commission, and 'in conferring this appointment upon him, expressed the strong desire of the Government that the views of the [Gladstone] Committee should, as far as practicable, be carried into execution'.⁴ Ruggles-Brise remained chairman until 1922, and his successors have considered that they have followed the same lines of policy. Mr. L. W. Fox, who is now chairman of the Prison Commission, wrote in 1934: 'Nothing is done today which is not implicit in the Gladstone Report, and many departures which may have been regarded as innovations have been no more than the carrying into effect of specific recommendations of the committee'.⁵ For fully fifty years there has been this unchanging statement of the basis of policy.

Now lawyers know something about what may happen when an 'authority' has been 'followed' for a number of years. We know that an original principle will be interpreted to meet particular

¹ 1939-1941, published in May, 1946, Cmd. 6820; 1942-1944, published January, 1947, Cmd. 7010; 1945, published July, 1947, Cmd. 7146; 1946, published December, 1947, Cmd. 7271.

² Cmd. 7227, published August, 1947.

³ Published for the Home Office by H.M. Stationery Office.

⁴ Evelyn Ruggles-Brise, *The English Prison System*, written for the International Prison Congress that was to have been held in 1915 but not published until 1921, p. 77.

⁵ L. W. Fox, *The Modern English Prison*, 1934, p. 39.

problems, and that sometimes the principle remains unchanged and sometimes, as precedents accumulate, there emerges a body of doctrine that is hardly reconcilable with the original formulation. The accumulations of change may result in a restatement giving us a new start, but often there is verbal continuity: the principle is known by some name, and as it is interpreted, modified and, in effect, altered it is still called by the same name. Hence, when a lawyer hears that a principle has been followed for fifty years he is not surprised if it turns out that that is really a way of explaining a series of logical developments. The argument of this paper is that the Prison Commission have by the very circumstances of their position followed the common law habits. In the Gladstone Report they had a compendious binding precedent, and they have tried to follow it and must still cite it, and if the current interpretation has got some way from the original authority that also is in the tradition of the common law.

When the old local prisons were taken over by the Home Office under the Prison Act, 1877, the Prison Commission had to organise what was, in effect, a new central service. It was the first time that something run locally had been taken over by the central government, and the chairman of the Prison Commission, Sir Edmund Du Cane, was determined to show what good administration really meant. The principles to be applied in prison treatment had been laid down by a Select Committee in 1863, and they are summarised in the phrase 'hard labour, hard fare and a hard bed'. The foundation of the system must be separate confinement and the treadmill and crank: 'Industrial occupation, though it may vary in amount and character, is so much less penal, irksome and fatiguing that it can only be classed under the head of light labour. . . . It has been alleged in the course of the evidence that the use of the treadmill and crank degrades, irritates and demoralises the prisoner; but the committee, after full consideration, see no reason for entertaining this opinion'. The Prison Act of 1865 followed these principles. A prisoner under the regime of Du Cane found a uniform and pitiless administration enforcing a policy of severity. It had been thought that by making prison a terrible place a prisoner would be deterred from committing other offences and potential offenders would likewise be deterred. The result was that prisoners were degraded, brutalised and embittered, and far from being deterred the incidence of recidivism appeared to be increasing. No deterrent effect on the general population could be observed. Many years later a Home Secretary said: 'The experiment had to be made at some time. The belief in the efficacy of severe punishments is always cropping up, and without the

devastating failure of this experiment we might never have known better. The failure was so complete that a departure to fresh principles became essential'.⁶

The Gladstone Committee, like other good commissions of inquiry, was not pernicky about its terms of reference; it made a broad survey, and the recommendations of the report⁷ cover a wide field. The fundamental problem was put by Sir Godfrey Lushington, then Permanent Secretary at the Home Office, in the course of oral examination before the committee.

Q. 11, 482. I regard as unfavourable to reformation the status of a prisoner throughout his whole career; the crushing of self-respect, the starving of all moral instinct he may possess, the absence of all opportunity to do and receive a kindness, the continual association with none but criminals, and that only as a separate item among other items also separate; the forced labour and the denial of liberty. I believe the true mode of reforming a man or restoring him to society is exactly in the opposite direction of all these. But, of course, this is a mere idea; it is quite impracticable in a prison. In fact the unfavourable features I have mentioned are inseparable from prison life. All that I care to insist on is that this treatment is not reformatory. I consider that a mediæval thief who had his right hand chopped off was much more likely to turn over a new leaf than a convict who has had ten years' penal servitude.

The committee in its report (paragraph 25) refers to that passage in the evidence and said: 'As a broad description of prison life we think this description is accurate; we do not agree that all of these unfavourable features are irremovable'. The recommendations designed to remove the unfavourable features consisted of some particular penal developments and of general principles for prisons.

The special matters were habitual criminals and young prisoners. As this paper is concerned with the general principles of prison administration little can be said about the special developments. The 'new form of sentence' recommended for habitual criminals was introduced under the name of preventive detention by Part II of the Prevention of Crime Act, 1908. The Act followed the broad principle that with a persistent offender it is useless to sentence him for a particular offence for which he has been convicted when (as the Gladstone Committee said in paragraph 85) 'the real offence is the wilful persistence in the deliberately acquired habit of crime'. Unfortunately the Act of 1908 requires a sentence of preventive detention to follow a sentence of penal servitude, and if the

⁶ Mr. Herbert Morrison, speech at the opening of a probation hostel at Birmingham, on March 28, 1944.

⁷ Report of the Departmental Committee on Prisons, C.7702, 1895, with Minutes of Evidence, C.7702.1.

particular offence does not in itself warrant a sentence of penal servitude it is impossible to impose preventive detention. For this and other reasons the provisions have been a failure, and new proposals are now before Parliament in the Criminal Justice Bill. The recommendations as to young prisoners were carried out in Part I of the same Act, which established Borstals. In both preventive detention and Borstal sentences there is some measure of an indeterminate sentence in the provisions for release on licence, but the principles are fundamentally different: Borstals started with the training of the inmates as the primary object, and here there can be no doubt that the system is on the right lines. The general ideas that moved the Gladstone Committee resulted in the establishment of probation by the Probation of Offenders Act, 1907, and of juvenile courts by the Children Act, 1908, but these and their subsequent developments are not based on recommendations of that committee.

The need for far better after-care of discharged prisoners was recommended by the Gladstone Committee, and its suggestion that this should be done by voluntary societies with official help has been followed and applied to discharge from all forms of detention.

Turning now to the principles that should govern prison administration, we have as the keynote the recommendation of the committee that 'prison treatment should have as its primary and concurrent objects deterrence and reformation'.⁸ Prisoners were no longer to be treated 'too much as a hopeless or worthless element of the community',⁹ but should have treatment that would 'turn them out of prison better men and women, both physically and morally, than when they came in'.¹⁰ The treadmill and crank must go and be replaced by productive labour. Now the treadmill and crank fitted in very well with a system of separate confinement: the crank could be operated in a cell, and a treadmill could be built with separate compartments, and the revolutions of both machines could be counted; there could be exact uniformity as between prisoners and different prisons. The substitution of industrial labour means that much of the work of prisoners must be done in workshops, and that must to some degree at least break down the separate system. The separate system was devised to prevent the better kind of prisoner from being contaminated by worse prisoners (and partly that a prisoner might reform himself by quiet solitary meditation), so that if the separate system is weakened there must be classification of prisoners to prevent contamination.

⁸ *Gladstone Report*, para. 25.

⁹ *Ibid.*, para. 23.

¹⁰ *Ibid.*, para. 47.

The three problems of prison labour, the separation of prisoners and their classification were interlocked.

The Gladstone Committee did not give a clear lead on these matters. The explanation lies in the basic proposition: 'prison treatment should have as its primary and concurrent objects deterrence and reformation'. The emphasis is here on the word *treatment*. The punitive element in prison labour was to be maintained, but at the same time it must not be so punitive that it precludes reformation of the prisoner. The necessity of modifying the separate system to allow of work in association was not to mean a freedom of prisoners to talk to each other, not so much from fear of contamination but because conversation was regarded as a 'privilege' that had to be earned; a measure of solitude was to be retained for its punitive effect. Classification of prisoners presented some difficulties, but these are unconnected with the interplay of deterrence and reform.

The Prison Act of 1898 made two main changes. The running of prisons ceased to be regulated in detail by statute and became a matter for rules made by the Home Secretary. The courts were given power to prescribe that a person sentenced to imprisonment without hard labour should be placed in the first, second or third division. These provisions were intended to give the Prison Commission the necessary framework for carrying out the general part of the Gladstone Committee's Report.

Ruggles-Brise did his best to carry out the recommendations. Treadwheels were dismantled, workshops built, and in some ways a vastly improved system was built up. At the end of the Ruggles-Brise regime in 1922 there was published Hobhouse and Brockway's *English Prisons Today*; that the system was not succeeding can be shown from many sources, and the great merit of this book is that the authors appreciated the underlying causes. At the end of their chapter on the Aims of the System they say: 'Perhaps the Commissioners are by now facing the question, whether it is possible to combine reformatory and punitive elements at all in one system of prison treatment, without all that is reformatory or curative being neutralised by the punitive elements'. The attempt to combine the two elements was in fact pushing the Prison Commission into untenable positions. An illustration is the sentence of imprisonment with hard labour. Ruggles-Brise¹¹ explained that 'the abolition of cranks, treadmills, etc., involved the necessity of finding work which should be of an onerous and disagreeable character for prisoners during the first month', which had to be spent in separate

¹¹ P. 137.

confinement, followed by less hard work in association. It was difficult to find suitable cell tasks, and the whole conception that training should induce habits of greater industry was defeated.¹²

Further progress was blocked by the principle that prison treatment must be deterrent. If the deterrent elements could be dropped then the reformatory elements might have a better chance, but can they be dropped with safety to the general administration of the criminal law? The approach has been to ask what it is that is deterrent in a penal sanction. This was mentioned in the Prison Commission Report for 1912 :

The penalty of crime is in the dishonouring circumstance, which must accompany loss of liberty; in the deprivation of what liberty permits in the way of indulgence and self-gratification; in compulsory labour; in the loss of self-respect. Nothing can add to the flétrissure which these things involve.¹³

A ferment was at work,¹⁴ but there was no general recognition that if this is correct there is no good reason for maintaining any strictly punitive measures that add to the punishment inherent in loss of liberty.

The reports of the Prison Commission in the mid-1920s do not examine this problem. They are concerned with arguing the case for reforming prisoners, though they very wisely dropped the word *reform* and kept to the word *train*: no one likes to be told he is going to be reformed, but to undergo training is a thing one can contemplate with equanimity. The case is simple; a prisoner is going to return at some time, usually not far distant, to ordinary life. If society is to be protected either the prisoner should be kept in prison altogether or for a very long time or he should be trained to habits of good citizenship. Since putting a substantial number of people away for very long periods would not be tolerated by the community, the main effort must be the training of prisoners. Mr. Fox took up the question of deterrence in his book published in 1934. The earlier tentative suggestions supposed that a potential

¹² 'In fact, what this provision did was to ensure that for twenty-eight days a hard labour prisoner worked less hard than an ordinary prisoner, and the restriction to prisoners so sentenced of the last vestige of separate confinement that was retained was presumably intended simply to preserve in another way the aspect of greater deterrence implied in sentences to Hard Labour', Fox, *op. cit.*, p. 27.

¹³ P. 27. This is hard to reconcile with the general outlook shown in Ruggles-Brise's writings, but it is undoubtedly his drafting; he was fond of using French words.

¹⁴ The Report to the Secretary of State for Scotland on the International Penitentiary Congress at Washington in 1910, Cd.5640 (1911), at p. 19: 'Unless for very short periods, it is not in fact in civilised countries now possible, even if thought desirable, to impose such conditions of hardship as would themselves act as deterrents. The loss of liberty is the real deterrent, combined with the feeling of disgrace which the more sensitive experience'.

offender would assume that if he were caught and convicted he would go to prison. By 1934 the progress of other methods of dealing with offenders had changed this to a chance of getting a prison sentence, and Mr. Fox came to the conclusion that the deterrent weapons of society are inherent in the police and the judicial system and in the fact of imprisonment.¹⁵ This is now accepted. It was put forward in a speech by the Home Secretary in 1944,¹⁶ and it appears in *Prisons and Borstals* :

The basic problem of prison administration is therefore to devise methods of treating prisoners which, on the one hand, will 'effectually . . . turn them out of prison better men and women . . . than when they came in', and, on the other, can be reconciled with the facts that the prisoner has been sent to prison as a punishment for an offence, and that the intention of the court in awarding that punishment is to deter both the offender and all potential offenders from committing further offences of that sort. To effect this reconciliation it is necessary to make the assumption that the deterrent force of the punishment lies primarily in the shame of being sent to prison and the fact of being in prison, with all that that fact in itself implies—complete loss of personal liberty; separation from home, family and friends; subjection to disciplinary control and forced labour; and deprivation of most of the ordinary amenities and intercourse of everyday life.

Given this assumption, the attempt can be made, within the framework of the limiting conditions, to eliminate from the regime whatever is merely negative and repressive, and to emphasise or introduce whatever may be positive and constructive; and especially to seek all means to counteract the deterioration of body and mind which is the gravest danger of prolonged imprisonment.

The history of English prison administration supports the view that such deterrent force as there may be in a prison sentence is due to the loss of liberty with all that that entails. When we had a hard, punitive and repressive regime inside prisons we did not find any greater deterrent effect than in a later period when the regime was less punitive. That hard punitive measures can 'stamp out' crime is a delusion for which, if that state of mind be curable, the remedy is the study of prison history. Those in charge of our prison administration know that history. Why then in the passage cited from *Prisons and Borstals* do they say 'it is necessary to make the assumption' instead of saying that that is so? It may be thought that this is merely the literary style of Whitehall, but that is not the reason. We come back to 'authority'. In a well-settled sphere like penal administration, policy must be based on statute or on the

¹⁵ *The Modern English Prison*, p. 31.

¹⁶ Mr. Morrison, see footnote 6.

recommendations of some inquiry whose report has been published and accepted. The Gladstone Committee Report is the last general inquiry, substantially endorsed by Parliament. It must be 'followed'.

The shift of emphasis on to training has resulted in changes that are still taking place in the classification of prisoners. The attempt of the Prison Act, 1898, to secure classification by the courts was a failure, mainly because the courts would not take the trouble to learn what their sentences meant. The Prison Commission accordingly built up their own classification, based partly on whether the prisoner has a good character or not ('stars' and 'ordinaries') and in two groups by age, 'specials' twenty-one to twenty-six or thirty (a classification now abandoned) and 'young prisoners' under twenty-one. In origin this classification was intended to reduce the chance of contamination. The needs for training tend to cut across these divisions. The best conditions for training are to collect together in one establishment a group of prisoners who can be expected to respond to a similar regime. A small group who will not respond may pull down the tone of the whole group, and so classification by criminal record must allow for classification for treatment.

Some valuable lessons were learned during the war. The most important is that prisoners can be trusted far more than had been supposed. In the early part of the war boys from a Borstal institution went out daily, individually or in small groups, to work for farmers. That was extended to a number of prisoners, who worked on farms, timber yards and on various sites for government departments. Work has been done in London docks, in power saw mills, in gasworks and clearing air-raid shelters, and so on, in public streets. There has been only token supervision, and virtually no trouble.¹⁷ At several prisons wooden huts had been built in the grounds as a precaution against loss of cells by air-raid damage. Pressure of accommodation led to the use of these huts as dormitories, and as that was successful it was continued on its own merits. In 1945 the locks on the doors were removed.¹⁸ A minor illustration that responsible behaviour is induced by giving a person some responsibility comes from a change about libraries. Books used to be distributed with some attempt to give a prisoner what he might want but without allowing him to see what he was getting.¹⁹

¹⁷ *Prison Commission Reports: 1939-41*, p. 44; 1942-44, pp. 35 & 40; 1945, p. 34; 1946, p. 41. Standard wages are paid to the Prison Commission, the prisoners receiving the normal payments under the prison earnings scheme.

¹⁸ *Prison Commission Reports, 1942-44*, p. 76; 1945, p. 26.

¹⁹ John Watson, *Meet the Prisoner* (1939), p. 108, recounts the story of a prisoner who wanted a book for the study of birds, and was provided for his week's reading with Ethel M. Dell's *The Way of an Eagle*.

In the latter years of the war prisoners were allowed access to the shelves to select their own books, and this led to an immediate reduction in the mutilation of books.²⁰

Before the war the practice of keeping selected prisoners in open camp conditions at the camp run in connection with Wakefield prison had been a success. The view that prisoners can be trusted more was put to the test by using an 'open' Borstal for prisoners who would in previous years have been thought unsuitable for conditions of unlocked dormitories and no prison walls. 'Many with bad records in other prisons worked well and gave no trouble'.²¹ The inference was that training by giving a far wider field for self-determination is feasible for men serving a second or even a third sentence. Should they be separated or should they be mixed with those serving first sentences? The answer is that 'classification need not be dominated by the bogey of contamination; on the contrary, it was more likely that the majority of decent men would influence the minority for good than the other way round'.²² The earlier experiment of having prisoners in open camps did not include men serving more than three years, and the period in the camp was limited to the latter part of their sentence. In 1946 Leyhill Prison, a former American Army hospital of huts, was opened for men serving long sentences, including prisoners serving life sentences. The Prison Commission point out that as well as solving a difficult problem of accommodation this action is 'a gesture of faith in a principle'.²³ There are no physical obstructions to prevent absconding, and the minimum of supervision. Parties work away from the prison. The most striking feature of Leyhill is, however, the amount of self-determination and initiative in the prisoners in the wide range of activities that are going on.

There have been a number of other developments in prisons during the last few years, but mention of them must be omitted for reasons of space and because they do not introduce new

²⁰ *Prison Commission Report*, 1942-44, p. 46. The history of books in prisons is an illustration of the conflict of principles. Books were linked to the progressive stage system, which as Ruggles-Brise tells us (p. 35) was the root of discipline; that is, books were a privilege. A Departmental Committee on Prison Libraries, 1911, Cd. 5589, was required by its terms of reference to have regard to the reformatory purposes of prison treatment and not to impair the stage system. Hence between the wars there was a clash between books being a privilege and the desire to encourage reading. Books have now been divorced from the stage system (*Report*, 1942-44, p. 34) and the encouragement of reading will be helped by the new system whereby local authority libraries are serving prisons (*Report*, 1946, p. 45).

²¹ *Prison Commission Report*, 1939-41, p. 46.

²² *Prison Commission Report*, 1942-44, p. 33. It was intended to keep to a ratio of sixty per cent. 'stars' and forty per cent. 'ordinaries', but pressure on accommodation led to the proportion being reversed, and it is thought that this may be beneficial: *Prison Commission Report*, 1946, p. 35.

²³ *Prison Commission Report*, 1946, p. 31.

principles. A change in education in prisons must, however, be mentioned. The effect of war conditions was to curtail educational work very severely. In 1945 an experiment was begun at Durham. The local education authority agreed, with the approval of the Ministry of Education, to regard the prison as an evening institute. In the following year it was agreed in principle between the Ministry and the Prison Commission that it is 'a proper function of an education authority to provide further education for the citizen in prison as for the citizen outside'.²⁴

The general impression from these recent Prison Commission Reports is that there is a far greater readiness to experiment than there has been in the past, and that difficulties have prompted progress rather than delayed it. But it must not be thought that there is any claim that all is now satisfactory. The attitude is that such and such kinds of persons are sent to prison, and the problem is what can be done with them.

If we take a cross-section of the prison population the first point that stands out is that about one-tenth consists of unconvicted prisoners, which includes those on remand, awaiting trial, and committals in default under wife maintenance and other orders. The defaulters are nearly all committed for a fixed period but will be released if the money due is paid. Prisoners in this group are in prison for periods normally ranging from a week to a maximum of three months.

The convicted prisoners are serving sentences that range from a few days to life. If we take receptions of men into prisons on convictions (excluding court martial and Borstal cases) the figures are :

	1918		1938		1945	
	<i>Number</i>	<i>%</i>	<i>Number</i>	<i>%</i>	<i>Number</i>	<i>%</i>
Not exceeding 1 month	81,986	78.2	13,865	51.0	6,350	26.1
Over 1 month and not more than 3 months .	13,932	13.3	6,518	23.9	7,497	30.8
Over 3 months and not more than 6 months .	4,204	4.0	3,634	13.4	5,083	20.9
Over 6 months and not more than 12 months .	2,651	2.5	1,770	6.5	2,934	12.1
Over 12 months and not more than 18 months .	993	0.9	659	2.4	1,169	4.8
Over 18 months .	306	0.3	284	1.0	587	2.4
Sentences of 3 years .	492	0.5	288	1.1	425	1.8
Sentences of over 3 and under 5 years .	77	0.1	74	0.3	149	0.6
Sentences of 5 years and upwards .	205	0.2	116	0.4	123	0.5

(In addition there were 8 life sentences in 1913, and none in 1938 or 1945.)

²⁴ *Prison Commission Reports*, 1945, p. 39; 1946, p. 44.

The great reduction in very short sentences between 1913 and 1938 was largely due to changes in law and practice as to enforcing fines; instead of automatic committal for non-payment there has been the system of time to pay, payment by instalments, and since 1935 a special inquiry into the means of an offender before committal to prison. The whole trend is clearly towards fewer very short sentences, but more than half the sentences given are still for not more than three months. A prisoner sentenced to more than one month gets remission of a third of his sentence for good behaviour in prison, and as this remission is usually allowed the periods in prison are shorter than the figures suggest at first sight.

The daily average population of prisons depends on the number of committals combined with the length of the period of imprisonment. Thus the number of receptions of convicted prisoners in 1945 (28,887) was little more than in 1938 (28,815), but because sentences tend to be longer the daily average population was 11,899 as against 9,330 in 1938. Since 1945 both the number of receptions and the length of sentences has increased, giving a daily average population in July, 1947, of over 17,300.

If we now take the views of the Prison Commission as to what they can do with those they have to receive, we get the following conclusions.²⁵

(1) Prison conditions cannot be made suitable for the training of persons under 21. (In 1945 there were 3,390 youths sent to prison.)

(2) Virtually nothing constructive can be done with prisoners serving short sentences; the principal thing is to see that they come to no harm, physical or mental.

(3) Effective training needs a period of at least six months. Allowing for remission and the time necessary to find out the particular kind of training that may be best, a sentence of 12 months (*i.e.*, 8 months to be served) must be the working minimum.

(4) Training will not succeed in all cases, and for the recidivist some form of preventive detention must be provided.

(5) Very long sentences make it difficult to avoid deterioration.

If the Criminal Justice Bill now before Parliament is passed in its present form it will have a number of effects upon prison administration. In the first place, penal servitude and sentences of hard labour or to divisions will be abolished: sentences of all lengths will be to simple imprisonment. This does not imply any change in the treatment of prisoners, which will continue to be regulated by prison rules. Second, the prison population will be directly affected by

²⁵ These views have appeared piecemeal in various Prison Commission Reports. The most valuable statement is a Memorandum in the Report for 1945, at p. 64.

provisions about certain sentences. There will be immediate restriction on the use of prison sentences for persons under twenty-one, and an ultimate prohibition of such sentences by magistrates' courts.²⁶ For persistent offenders there will be the possibility of sentences of corrective training or preventive detention.²⁷ Third, a number of provisions such as improved facilities for probation and remand may result in fewer committals to prison.

The new law will presumably mean the end of the class of young prisoner, but there is nothing in the Bill that will prevent courts from passing so many very short sentences or to compel the courts to make use of corrective training or preventive detention. The main problem for the future is the extent to which the courts will cling to their traditional attitude towards sentencing. This attitude is examined in Chapter III of the Report of the Departmental Committee on Persistent Offenders.²⁸ The judicial technique is to start with the view that the intrinsic character of the particular offence determines the nature of the sentence. The maximum sentence is for the most heinous, and for an ordinary offence the appropriate sentence is well below the maximum. The good record of the prisoner may lead to a lighter sentence, or to some other course such as binding over, but his bad record ought not to increase the sentence beyond the standard appropriate to the particular offence. A man steals valuable things, and the maximum that 'can' be given may be one or two or three years: he steals things of little value, and the maximum is seen as one, two or three months. A man who commits small offences will get very short sentences until he commits a bigger offence and is given a sentence long enough for training in prison. The prediction for training in prison is a fairly high expectation of success for a prisoner serving his first sentence, with a lower expectation for each previous sentence. So the process of graduating up to the longer sentence generally makes it useless at that stage. Then the question arises of whether the protection of the public does not require some more drastic step.

²⁶ Instead of prison sentences there will be orders for detention in a detention centre (when such places are ready) for three or possibly six months, or any of the courses at present available which include Borstal and probation.

²⁷ These new kinds of sentence cannot be given unless a person has been convicted on indictment of an offence punishable with at least two years. If the offender is not under twenty-one, and has been convicted at least twice before of offences carrying two years or more, and 'the court is satisfied that it is expedient with a view to his reformation and the prevention of crime', he can be sentenced to corrective training for not less than two or more than four years. If the offender is not under thirty, and has at least three previous convictions on indictment of offences carrying two years and was on at least two of those occasions sentenced to Borstal, imprisonment or corrective training, the court if 'satisfied that it is expedient for the protection of the public' may sentence him to preventive detention for not less than five or more than fourteen years.

²⁸ 1932, Cmd. 4090.

One witness told the Persistent Offenders Committee that for larceny of a bicycle he would never feel justified in giving a longer sentence than twelve or fifteen months, no matter how often the offender had been previously convicted. On that view, the most persistent stealer of bicycles will never be given corrective training or preventive detention. These things must happen as long as sentencing is tied to the intrinsic character of the offence. Prison administrators should be patient and yet hopeful, for they in their time have committed follies in the name of an outworn theory.

MOOT CASE ON DEFAMATION¹

C. J. HAMSON

Topp v. Lire. Pluck v. Lire.

THE following judgment was delivered:—

The facts of the cases now before us, which have been consolidated for the purpose of this hearing, fall within a narrow, perhaps too narrow, compass.

The defendant, the present respondent in both appeals, Mr. Lire, broadcast what is called a talk over the extensive radio system belonging to a third person, who, for reasons best known to the litigants, is not a party to these actions. The talk was concerned with the public schools of this country, and in the course of it Mr. Lire used these words: 'I should not advise any parent to send his boy to Highstanton School, for the headmaster and his staff were all conscientious objectors during the recent world war'. In respect of these words actions for defamation were instituted against Mr. Lire both by Mr. Topp, the headmaster of Highstanton, and by Mr. Pluck, one of the assistant masters of that school.

Mr. Lire has not attempted to justify his imputation. It is admitted to be untrue both of Mr. Topp and of Mr. Pluck, who has served as an officer in His Majesty's army throughout the late war; and, indeed, there is no evidence that the allegation was true of any member of Mr. Topp's staff.

The defences raised on Mr. Lire's behalf were, in both actions, first, that the words were incapable of a defamatory meaning and, secondly, that if they were defamatory they constituted a slander requiring proof of special damage before an action upon them could be sustained, and no such special damage had been alleged. As a separate defence to Mr. Pluck's action, it was also pleaded that the words concerned a class of persons generally and could not be relied upon by Mr. Pluck, a member merely of that class, as so referring to him individually that he was entitled to found upon them a personal action for defamation.

These defences severally commended themselves to the trial judge, with the result that both actions were dismissed. It is from that dismissal that Mr. Topp and Mr. Pluck now appeal to this court.

¹ Set by Prof. P. H. Winfield, K.C. and argued by members of Balliol College, Oxford and St. John's College, Cambridge, Law Societies.

I propose to consider first the defences common to both actions; for, should either of them succeed, the validity of the separate defence to Mr. Pluck's action does not come into question.

The plea that the words used by Mr. Lire are incapable of a defamatory meaning is one which seems to me *prima facie* devoid of all merit. I would for my own part accept it only if constrained thereto by binding authority. What weighs with me is that Mr. Lire has himself proffered the alleged conscientious objection of Mr. Topp and his staff as a good reason why any parent should shun and avoid Highstanton.

While the words 'conscientious objector', especially in a more abbreviated and vernacular form, might amount to mere abuse, it is clear that they are not in this context abusive merely. And, indeed, that has not been seriously contended. What has been contended is that, though offered by Mr. Lire as a sufficient reason for the avoidance of Highstanton by parents, the alleged conscientious objection of Mr. Topp and his staff could not by any right-minded parent have been regarded as any reason whatever why he should not send his children there. Counsel for Mr. Lire would have us believe that the words amounted to a commendation of Highstanton, so far as right-minded parents were concerned. It is, however, certain that that was not Mr. Lire's intention; and in so far as the words used may be to any degree ambiguous, it would, in my opinion, be proper to allow Mr. Lire's intention, effectively expressed, to determine their meaning—provided of course the necessary innuendo was alleged and proved.

No word in common use has any absolute meaning, for words are a conventional device for communication. A dictionary may define a strict or correct meaning; but the strict meaning is not necessarily the exclusive and only meaning of that word. The word may also have a special conventional meaning and, indeed, more than one. So, to call a man a 'lame duck' may appear to refer merely to his gait, and therefore to be not defamatory but merely descriptive. Yet amongst a restricted class the words also bear the meaning that the person referred to is unable to meet his financial obligations. If the speaker intended his words to bear this special conventional meaning and used them before an audience which included members of the restricted class so understanding them, upon proof of the innuendo, undoubtedly the words, being false, would be defamatory²: even though Lord Atkin's proposition³ is accepted (as I respectfully accept it) that a statement is not defamatory

² *Morris v. Langdale* (1800), 2 Bos. & P. 284, but compare *Barnett v. Allen* (1858), 3 H. & N. 376.

³ *Sim v. Stretch*, [1936] 2 All E.R. 1237, 1240, H.L.

unless 'the words tend to lower the plaintiff in the estimation of right-thinking members of society generally'. For though the words as understood by some of the audience would not be defamatory, yet when their special conventional meaning is written out in longhand all the audience would agree that a derogatory suggestion had been made.

The words 'conscientious objector' have no doubt a dictionary meaning which, I suppose, indicates a member of that class of persons who have availed themselves of the liberty granted by Act of Parliament⁴ to avoid the performance of the duty otherwise in time of war or of emergency incumbent upon them—namely, either by the bearing of arms or, in proper cases, by other appropriate exertions, actively to assist so far as may be in the physical defeat of the threatening common enemy. The words, in this meaning, should by a court be held, I think, to be strictly neutral. The liberty is granted by Parliament, and it is not for this court in the abstract to commend or to condemn its exercise: though a court should note that a legal liberty merely is involved and not a legal duty. It is certainly not the legal duty of any man to be a conscientious objector. It is a question whether a court may further observe that this liberty is exercisable only at the expense of the body of the commonwealth and at the expense also of the bodies of those individuals who by their exertions, their sufferings or their sacrifices endeavour to maintain that system of law within which alone this liberty can exist; for it is perhaps in certain circumstances arguable that the exercise of this liberty may of itself tend to promote other good within the same political society.

Yet, however neutral the words 'conscientious objector' may in this sense be, it is plain that they may, and do often, bear special conventional and indeed contradictory meanings. Thus, if used by a member of the Society of Friends at a meeting of the Society and of a fellow member they would obviously imply, and be taken as implying, a high commendation: and that of conduct which the law as such neither praises nor blames. Moreover, this conventional meaning, if expressed in longhand, would be understood as a commendation by all right-minded men; for its longhand expression would, I suppose, be: 'Here is a man who has a grasp of right principle and the courage to maintain that principle in times of stress'. But it is to me equally plain that at a different sort of meeting the same words would bear a very different sense, whose longhand expression might be: 'Here is a man who suffers from such a degree of mental imbecility, moral obtuseness or emotional

⁴ National Service (Armed Forces) Act, 1939, s. 5.

unbalance, or from so overbearing a sense of his own personal importance or advantage, he is unable to appreciate or to perform the most elementary social duty of a citizen'. And again this meaning, if expressed, would by all right-minded men be appreciated, when untrue, as plainly defamatory.

It is not for me, sitting here, to attempt to appraise the relative merits of these differing views. It is sufficient to note their existence, and particularly their effect upon the significance of the words 'conscientious objector' as used by Mr. Lire. Their effect, as I understand it, is to give a special and precise meaning, either for praise or for blame, to words which may no doubt in some contexts be neutral.

Accordingly, it seems to me, with all respect to the trial judge, quite impossible for this court to rule as a matter of law that the words 'conscientious objector' are necessarily incapable of a defamatory sense. They require in each case to be considered in their context and with reference to the persons to whom they are published. I would, for myself, go further and be inclined to hold that, since they were published by Mr. Lire indiscriminately and since in the context in which he used them he stated conscientious objection to be a disqualification for the office of schoolmaster, there was sufficient evidence to enable this court to conclude that they here effectively bore a defamatory sense.

I am fortified in this conclusion by the case⁵ in which Lord Camrose recovered £12,500 as damages for defamation against the printers, publishers and editor of the newspaper connected with the British Union of Fascists, upon ground that in that journal they had alleged of him, inter alia, that he was a Jew. The court there was willing to hold that the innocent appellation Jew could by its context be converted into a deadly accusation. Similarly here: the possibly innocent or laudatory term 'conscientious objector' may well by its context be turned into a vile and sinister name.^{5a}

It has, however, been argued that I am debarred from such a conclusion by a series of cases, and in particular by *Byrne v. Deane*,⁶ where it was held that it cannot be defamatory to say of a man falsely that he was an informer—that is, that he had informed the

⁵ *Lord Camrose v. Action Press Ltd., Argus Press Ltd. and John Beckett*, 1936 C. No. 1252. *Times Newspaper*, Oct. 14, 15, 16, 1937. Hilbery, J. and a special jury. And see *Burns v. Associated Newspapers* (1925), 42 T.L.R. 37, Astbury, J.

^{5a} A strong Court of Appeal (Greene, M.R., Asquith and Evershed, L.J.J.) has very recently held in *Braddock v. Bevins*, [1948] 1 All E.R. 450, that the following words were capable of a defamatory meaning as an attack upon the political sincerity and political integrity of the plaintiff: 'I am horrified that the Socialist M.P. for this division . . . should persistently take sides with the Soviet Government and the British Communist Party'.

police of the commission of a crime, even if that crime were the very minor offence of keeping a fruit gambling machine upon the premises of a club, and even though the other members were, not perhaps very unreasonably, incensed by the delation and seriously annoyed at the alleged informer. It is enough for me to say that *Byrne v. Deane*⁶ and its predecessors are clearly distinguishable. In the estimation of the law, there is a legal duty to repress the commission of crime. To say of a man no more than that he has performed his legal duty cannot, in the estimation of the law, amount to a defamatory statement, even if some of his fellows are vexed by that performance. There is, I repeat, certainly no legal duty to be a conscientious objector; and whatever the allegation of conscientious objection may entail, it does not amount to the bare statement that a man has performed merely his legal duty. This view would, I think, have commended itself to Greer, L.J., who, in *Byrne v. Deane*,⁶ agreed with his brethren in the statement of law, though he dissented from them on its application to the facts.⁷

I would, however, in any event, be indisposed to extend this line of cases—and an extension here is needed—for while there is a law of defamation it seems to me desirable that the law should be content to recognise as defamatory what reasonable men do in fact regard to be derogatory. I do not see how I can be debarred from at least permitting a jury to consider the sense of the words ‘conscientious objector’ in their actual context merely because a court has previously put upon the word ‘informer’ a meaning which might or might not have commended itself to my own mind.

Upon the view which I have formed, the sting of the defamation uttered by Mr. Lire lies in the allegation of conscientious objection and in the innuendo thereby conveyed. It may, however, also be suggested that the words are defamatory because, whether or not a sufficient reason is alleged, it is plainly stated that Mr. Topp is unfit to be the headmaster of a school, the sting of the defamation lying now in the allegation of such unfitness. I am not prepared to dissent from this suggestion, though I do not wish to found myself upon it, since it may be that the very statement of the reason of the supposed unfitness does restrict the imputed unfitness to such, if any, as may arise from that cause; and if we were to hold that of necessity none so arises, then it might appear that none effectively is imputed. It is preferable, in my view, to find the defamation in what was plainly intended to be the sting of the statement—namely, that Mr. Topp was a conscientious objector.

Granted then that the words may be defamatory, are they

⁶ [1937] 1 K.B. 818, C.A., Greer, L.J. dissenting.

⁷ See particularly [1937] 1 K.B. at p. 841.

actionable without proof of special damage? We have heard much argument upon whether publication of defamatory matter by broadcasting over the wireless is a libel or a slander. If that is necessarily slander which is addressed exclusively to the ear, then cadit quaestio: broadcasting constitutes a possible slander only, at least when the words are not synchronised with a televised picture.⁸ But I doubt if the distinction between libel and slander is properly and exclusively to be found in the organ of perception wherewith the defamatory matter is received. At least as important is the transience or permanence of the form in which the defamatory matter is embedded; and if a reason is to be sought why spoken words are classed as slander it may perhaps be because speech is of all the most transient form—though a reason here is an ex post facto rationalisation of irrational historical accidents. Upon this view, if there be a more or less permanent record and the record is as such communicated, the publication amounts to a libel even though the person receiving the publication receive it merely by ear. Accordingly, the playing of a defamatory gramophone record would, upon this view, amount to a libel.

It must, however, be admitted that this conclusion is doubted by that great authority upon the law of tort, Professor Winfield,⁹ though accepted in *Salmond*¹⁰ and by the learned editor of *Pollock*¹¹; and this court must necessarily show a certain hesitation in deciding an issue which has produced such a conflict of opinion. Nevertheless there is authority binding upon us to hold that the reading of a defamatory letter at a public meeting constitutes a libel, though the report of the case¹² leaves much to be desired; and I believe that this authority would permit me to conclude that the broadcasting of defamatory matter over the wireless is a libel if read from a script: which I understand both is, and by many is known to be, the normal practice in the case of talks such as that given by Mr. Lire.

In expressing such a view, I must necessarily dissent from the decision¹³ of the Australian court in Victoria, though I would be sustained by a considerable number of American decisions¹⁴; and I would perhaps have some difficulty in accepting as reported the case of *Bergman v. MacAdam*,¹⁵ decided by Charles, J., in 1940. It

⁸ See *Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T.L.R. 581, C.A.

⁹ *Textbook*, 3rd ed., p. 237-8.

¹⁰ 10th ed., by Dr. Stallybrass, p. 371.

¹¹ 14th ed., by P. A. L. Landon, p. 188 n.

¹² *Forrester v. Tyrrell* (1893), 9 T.L.R. 257, C.A.

¹³ *Meldrum v. Australian Broadcasting Co., Ltd.*, 1932, Vict. L. R. 425, and see 51 L.Q.R. 573.

¹⁴ Collected in 46 *Harvard Law Review* 133

¹⁵ *The Times Newspaper*, Oct. 8, 1940.

would also follow from my view that if the talk, whether or not originally read from a script, were recorded and the recording subsequently broadcast—a procedure which I understand to be not unusual—then both the speaker (if he intended the subsequent broadcast) and the broadcaster himself would be publishing a libel.

Accordingly, if it were necessary for this court to decide whether this publication by Mr. Lire did or did not amount to a libel the case would in any event have to be referred for the hearing of further evidence directed to the actual circumstances of the broadcast.

But I think it desirable to express my opinion that, if it is open to me to do so, I would go further and restrict slander to the mere normal speaking of words normally received as words and to merely transient gestures. Anything else which is defamatory I would be willing to classify as libel. Since words broadcast would clearly fall outside the category of slander so limited, a defamatory broadcast would, in my opinion, amount to a libel both on the part of the speaker and of the operating corporation, whatever the actual process of the particular broadcast.

The truth of the matter, as I understand it, is that the distinction between libel and slander, at best never very rational, fits singularly ill the conditions of modern society; and, if it is to be preserved at all, must suffer some degree of violence one way or the other. I would for myself prefer, consonantly with my view of the course of our legal history,¹⁶ to extend the ambit of libel rather than that of the much more technical tort of slander.

However, it is, I think, possible for the court to avoid today the burden of deciding this vexed question, seeing that on the facts of this case, even if the matter broadcast were held, contrary to my opinion, to amount to slander only, the appellants are, in my view, entitled to succeed without proof of special damages.

The words spoken seem to me beyond question, in the language of Mr. Gatley,¹⁷ to 'connect the subject-matter of the slander with the trade or profession carried on by the appellant'. If Mr. Lire had said of Mr. Topp merely that he was a conscientious objector, then, on the authority of *Jones v. Jones*,¹⁸ it might be possible to hold that Mr. Topp had not been defamed in his profession as a schoolmaster, even though parents were by the defamation induced to shun and avoid Highstanton. But in *Jones v. Jones*¹⁸ the adultery alleged was not alleged of the plaintiff as a schoolmaster, though in fact he was a schoolmaster; and though the allegation was admitted to be injurious to him as a schoolmaster, the injury

¹⁶ Cf. Holdsworth, 8 *H.E.L.* at p. 367.

¹⁷ *Gatley on Libel and Slander*, 3rd ed., p. 61.

¹⁸ [1916] 2 A.C. 481.

admitted, as Lord Sumner¹⁹ in his judgment makes plain, was limited to that suffered by any man, schoolmaster or not, who held a public or quasi-public office. In the present case Mr. Lire has gone on to draw the moral and point the conclusion from his own defamatory statement; and, indeed, has addressed his criticism of Mr. Topp as a schoolmaster to a general body which includes Mr. Topp's employers and potential employers. Conscientious objection is by Mr. Lire held out to be something which disqualifies Mr. Topp from being a headmaster. The subject-matter of the defamation could not, in my opinion, have been more closely connected with the appellant's profession. If authority for such a view of *Jones v. Jones*²⁰ is required—and for my part the mere reading of *Jones v. Jones*²⁰ itself makes the matter plain enough—I would rely upon the illuminating judgment of Greer, L.J., in *de Stempel v. Dunkels*,²¹ and with him I would repeat: 'I fail altogether to understand how it can be said that these words do not relate (*sic*) or touch the plaintiff in his office or employment'.

Accordingly, whether the statement made by Mr. Lire amounts to a libel or a slander, I hold that Mr. Topp is entitled to recover without proof of special damage.

I do not wish to extend an already overlengthy judgment by dealing with the special defence raised in Mr. Pluck's action. Let it suffice that, for the reasons to be given by my brethren, Mr. Lire's statement concerning the staff of Highstanton, though made of a class of persons, in my view, referred not merely collectively to the class but distributively to each member of that class,²² and that therefore Mr. Pluck, being admittedly a member of the class, is as much entitled to sue as if he had been indicated by name.

For these reasons our decision, in my view, should be in favour of the appellants upon each of the three defences raised on behalf of Mr. Lire; but whether as a result judgment should forthwith be entered for them, or whether a re-hearing should be ordered, and if ordered whether it should be a re-hearing generally or limited to particular issues, is a matter which may require further argument when my brethren have delivered judgment.

¹⁹ *Ib. id.*, at p. 493-4.

²⁰ [1916] 2 A.C. 481.

²¹ [1937], 54 T.L.R. 289, 291, C.A.

²² Compare *Knupffer v. London Express Newspapers*, [1944] A.C. 116.

THE CORRELATION OF ALLEGIANCE AND PROTECTION

GLANVILLE L. WILLIAMS

IN the last number of the *Cambridge Law Journal*¹ Professor Lauterpacht made the decision in *R. v. Joyce*² the occasion of a lucid discussion of the topics of allegiance and protection, including the correlation of allegiance and protection, the diplomatic protection of non-nationals and the duty of allegiance of protected persons. He came out in support of the decision in *Joyce*, though he was cautious in assessing its implications outside the actual facts of the case. Since the argument for the decision has been put so fully it is perhaps as well that the legal aspect of the case for the other side should also be stated, particularly as it does not completely appear from the judgments and speeches.

Speaking of the criticism already directed against the *Joyce Case*, Professor Lauterpacht says: 'There is room for the view that ultimately the authority of the law depends on the support given to it by public opinion, and that criticism must therefore be studiously and painstakingly informed—especially in face of a practically unanimous decision of the judges in all three instances'. This is somewhat intimidating to the critic, and it might be made a question whether it does not raise the barrier to criticism rather too high. Of course, one likes a critic to be well informed, because that adds to the weight of his remarks; but, with respect, it would not seem to be in the public interest to silence all criticism coming from those who do not claim to be experts. Also, in this particular case a critic may feel the more confident because he knows that he does not stand alone. Despite the unanimity of the Bench in *Joyce's Case*, the great body of contemporaneous opinion at the Bar, so far as one could gather it from private conversations, was against the decision.³ One can go farther. As soon as it became generally known that Joyce was not a British subject, and that the continuation of the charge against him was made possible only by the fact that he possessed a British passport, there was a remarkable revulsion of feeling even in lay circles against a conviction. To

¹ (1947), 9 C.L.J. 330.

² [1946] A.C. 347.

³ For a published criticism see W. L. Walker in Cobbett's *Cases on International Law*, 6th ed., i, pp. 199-201.

many 'men in the street', notwithstanding the odious character of Joyce's activities in Germany, a conviction seemed undesirable when it could be gained only by what was regarded as a legal device.⁴

Because *R. v. Joyce* reached the House of Lords the precedent established by the case is now beyond recall, except, of course, by statute. The facts were highly peculiar and are unlikely to recur, particularly in view of the rarity of treason trials, which are virtually confined to the circumstances of war. These considerations might suggest the conclusion that a criticism of the case is merely an academic exercise. But the decision has a certain importance beyond its narrow facts, and in its wider aspects the question whether it is approved or not is of importance. Also, the case is open to discussion on the general question of judicial legislation in the field of criminal law. Everyone now agrees that the judges should not extend the criminal law under the guise of applying it, however detestable the conduct of which the prisoner has been guilty. We no longer tolerate Acts of Attainder, and so we cannot, consistently with our own views, approve the same result being attained by unavowed departure from the existing law. In fact, as the volume of criticism of *Joyce's Case* shows, the maxim *nulla pœna sine lege* is now deeply ingrained in our national consciousness. Of course, the judges did not consider that they were violating this maxim: they believed themselves to be merely applying settled principles to new facts. It is always a difficult question of degree whether an apparently new determination is an application of old rules or an extension of them. This is a question on which we must each make up our own mind; it is not a question on which we can simply accept a judge's word, for *ex hypothesi* the judge has come to the conclusion that his decision does not extend the law.

It remains only to note, before starting the technical discussion, that the present article is confined to the question whether Joyce owed allegiance to the Crown. Nothing is here said on another aspect of the case, namely, whether it was proper to assume criminal jurisdiction over an alien in respect of acts done abroad.

1. ALLEGIANCE AND PROTECTION: FACT OR DUTY?

The legal issue to be discussed may be very briefly stated. At the time of committing the acts charged Joyce was neither a British subject nor on British soil. He possessed, however, a British passport obtained by misrepresentation, whether innocent or

⁴ The same conclusion is reached by Mr. J. W. Hall (himself a member of the Bar) in his work *Trial of William Joyce* (Notable British Trials Series), pp. 35-6.

fraudulent.⁵ The question was whether in these circumstances Joyce owed a duty of allegiance capable of being violated by the commission of the crime of treason.

The premise from which the judges started was the correlation of allegiance and protection. In the words of *Calvin's Case*, 'Protectio trahit subjectionem, et subjectio protectionem'.⁶ Apparently, as this maxim indicates, it is possible to argue both ways—that is to say, both from allegiance to protection and from protection to allegiance. To take a rough parallel, if one knows that X is a husband it necessarily follows that he has a wife, and if one knows that Y is a wife it necessarily follows that she has a husband. In the same way, if one knows that X owes allegiance, it necessarily follows that the Crown owes him protection, and if one knows that the Crown owes X protection, it necessarily follows that X owes allegiance.

The argument in support of the conviction of Joyce was therefore simple. Joyce obtained international protection—or the possibility of it—by his possession of a British passport: having protection, he owed allegiance.

The fallacy in this view, as it seems to the opponents of the decision, is that it mistakes the meaning of protection for the purpose of the legal rule. When it is said that protection is correlative to allegiance, what would seem to be meant is that the duty of protection is correlative to the duty of allegiance.⁷ Now the Crown did not owe Joyce a duty of protection when he was in Germany. The most that can be said is that the passport gave Joyce a possibility of protection *de facto*. But it is legally unsound to argue that *de facto* protection (or the possibility of it) raises a correlative duty of allegiance. At any rate for modern law it is the duty of protection that raises the duty of allegiance, not merely protection in fact.

That the correlation is generally between duty and duty, not fact and duty, can be demonstrated. First, the duty of allegiance

⁵ Lauterpacht (*op. cit.*, 338, n. 25) assumes that the passport was obtained fraudulently, and this view is borne out by the fact that Joyce untruthfully stated in his application for the passport that he was born in Ireland. But the House of Lords left the question open as being irrelevant. J. W. Hall points out (*Trial of William Joyce*, 22, n. 9) that if Joyce honestly believed himself to be British that made his conduct in adhering to the Germans all the worse.

⁶ (1608), 7 Co.Rep. 2a at 5a, approved in *Isaacson v. Durant* (1886), 17 Q.B.D. 54 at 62. Cf. Broom, *Legal Maxims*, 10th ed., 42. Co.Litt. 65a explains the ceremony of homage, in which the tenant places his hands between those of his lord (a ceremony that is still preserved in the conferring of degrees in some of our universities) as symbolising this relationship of reverence and defence.

⁷ Cf. *Calvin's Case*, loc. cit.: 'Ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; he is called their liege lord, because he should maintain and defend them' [*italics mine*].

persists even though protection is not in fact being given at the moment, because of invasion by enemy forces: the *duty* of protection continues, and this supports the duty of allegiance. As Professor Lauterpacht puts it, 'The *De Jager Case* showed that the duty of allegiance is not affected by the temporary and involuntary absence of protection'.⁸ A contrary view might at one time have received some plausibility from a remark of Blackstone, 'Allegiance', said Blackstone, 'is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully.'⁹ This view, if it ever had any foundation (which seems unlikely), must now be regarded as abandoned. The duty of allegiance is supported not by the fact of protection but by the duty of protection, and the analogy of the private-law doctrine of discharge by breach of contract or failure of consideration is not here regarded as relevant.

Second, it seems that the duty of protection persists even though the subject is not acting in the spirit of his duty of allegiance. To quote Professor Lauterpacht again, 'In *Johnstone v. Pedlar* the court brushed aside the suggestion that the plaintiff, an American citizen of Irish revolutionary sympathies, was not entitled to the full protection of the law because of his active sympathies with the cause of the Irish revolution'.¹⁰ The matter here is not altogether simple, because it may be that actual violation of the duty of allegiance by the commission of an act of treason justifies the Crown in withdrawing protection.¹¹ Thus it seems that here, though not in the former case, we may apply the principle whereby in private law a serious breach of contract by one side discharges the other. Yet even this does not negative the interdependence of the two duties before breach on one side.

Third, the mere fact that an alien feels a spirit of allegiance and acts in accordance with it, even though he acts at the request of the Crown (*e.g.*, by aiding British agents abroad), would not create in the Crown a duty of protection.

It seems logical to add: fourth, the mere fact that the Crown gives an alien protection, even though at the request of the alien, does not create any duty of allegiance. The duty of allegiance is brought into being only by a duty of protection. Yet this seems to be denied by the decision in *Joyce*.

⁸ [1907] A.C. 326; Lauterpacht, *op. cit.* 335.

⁹ Bl. Comm. i, 370.

¹⁰ [1921] 2 A.C. 262; Lauterpacht, *loc. cit.*

¹¹ Cp. Winfield, *Text-Book of the Law of Tort*, 3rd ed., 86: 'It may be inferred from their [Lordships'] decision that even where a resident alien flagrantly violates his local allegiance to the Crown, as Pedlar had done, yet he still retains his rights until the Crown withdraws its protection' [*italics mine*]. So also Wade and Phillips, *Constitutional Law*, 3rd ed., 178.

The objection to the *Joyce Case* can be pushed farther if we consider the nature of the protection to which the duty of protection obliges.

2. THE NATURE OF PROTECTION : POSITIVE PROTECTION

It is easy to repeat the axiom that the duties of allegiance and of protection are correlative, but we need to look a little more closely into the meaning of the words. The meaning of the duty of allegiance is clear : it signifies that one must not commit treason. But what is meant by the duty of protection ? Breach of the duty of protection is not an offence directly punished by the law ; but the duty must receive some sort of legal definition and recognition, or else we can hardly say that it is a duty. What sort of protection is referred to ? Is it the provision of a police force, defence by armed forces, protection by diplomatic representations, or simply the law-abidingness of the executive in relation to the individual ?

If these four possibilities are examined it will be seen that they really resolve themselves into two : protection of the individual against the activities of others (whether such protection take the form of force or persuasion), and respect for the individual by the sovereign in the course of his own activities. The first may be called positive or active protection : the sovereign exerts himself actively on behalf of the individual against fellow-citizens or foreigners. The second is negative protection, the absence of illegal interference with the individual by the sovereign himself and his officers. Let us take first positive protection, which is protection in the more natural meaning of the word.

The sovereign's duty of positive protection of the subject is recognised by English law in connection with the doctrine of consideration, and this appears to be the only connection in which it comes directly before the courts in England. A promise by the subject to reward the sovereign or the police for performing the duty of providing reasonable police protection within the realm is void for lack of consideration, for the performance of an existing legal duty owed to the other is not consideration. This was recognised by the House of Lords in *Glasbrook Bros. v. Glamorgan County Council*,¹² where, however, it was held that on the facts the police protection provided went beyond the amount required by the general duty, so that the promise to pay was valid. It was also held in *China Navigation Co. v. Att.-Gen.*¹³ that the duty of positive physical protection did not extend beyond the King's dominions ;

¹² [1925] A.C. 270.

¹³ [1932] 2 K.B. 197

the Crown was under no duty to follow adventurous British subjects over the globe with an adequate police force. It was therefore held that a promise by the subject to pay for such protection outside British territory was binding.

The fact that the duty of positive physical protection does not extend outside British territory shows that this duty is not co-extensive with the duty of allegiance, for a British subject is under a duty of allegiance wherever he may be. Treason can be committed by British subjects anywhere in the world. This may be thought to create a difficulty in the theory that allegiance and protection are correlative. One way of getting round the difficulty would be to postulate that the Crown (though under no duty to give the subject physical protection when in foreign parts) is under a duty to give him protection abroad by way of diplomatic representations when they are needed. Whether such a duty of diplomatic protection exists has not been decided; apparently the question could come before the English courts only if the Crown stooped so low as to demand a promise to pay in return for diplomatic protection. (The question could not be tested on a writ of mandamus, for that does not lie against the Crown.) As a matter of speculation it may be suggested that the assumption is unsound and that the courts would (notwithstanding certain dicta in *Joyce's Case* shortly to be considered) refuse to recognise the duty. It is true that diplomatic protection is generally accorded to British subjects, but it is given as of grace, not as of right. This view need not, however, be regarded as destroying the correlation between allegiance and protection as legal duties. In return for the Crown's duty of protection while the subject is within the dominions, the subject owes a duty of allegiance wherever he may be. The fact that the two duties are not co-extensive in their territorial application does not mean that they are not correlative.

The remarks in the last paragraph were confined to British subjects. An alien is in a different position. While in England he owes a local duty of allegiance¹⁴ in return for a local duty of protection. In this case there is certainly no duty of diplomatic protection while the alien is abroad (except possibly where the alien is a British protected person, who may be put in the same position as a British subject in the unlikely event of a duty of diplomatic protection being recognised in English law at all). Also, an alien was regarded before *Joyce* as being under no duty of allegiance when once he leaves the dominions, again with the possible exception of British protected persons (who will be considered later),

¹⁴ Bl. Comm. i, 370; *De Jager v. Att.-Gen. of Natal*, [1907] A.C. 326.

and also with a possible exception based on a passage in Foster's *Crown Law* (which also will be considered later). Subject to these two possible exceptions, the alien's duty of allegiance appeared to be geographically co-extensive with the duty of protection.

We can now apply these principles to the facts of *R. v. Joyce*. The prisoner was held to owe a duty of allegiance purely and simply because he obtained protection (or the possibility of it) by means of his passport. But the argument of this paper is that the duty of allegiance can be deduced only from a duty of protection. Even if Joyce had been a British subject, it seems probable that the Crown would not have owed him a duty of diplomatic protection when abroad. Since he was an alien, and not even (in the technical sense) a British protected person, it seems beyond argument that no such duty was owed to him. The fact that he obtained a British passport by misrepresentation could not, one would have thought, create in the Crown a legal duty of diplomatic protection towards him, even if such a duty were otherwise recognised by English law.

There is one conceivable argument against this view. It may be said that the passport, having in fact been issued by the Crown to Joyce, was (though voidable for misrepresentation) not altogether a nullity; it was an effective passport until avoided by the Crown, and at the relevant times it had not been avoided. The answer to this is that what is in issue is not the existence of the passport but the existence of the duty of protection. Granting that the passport was for present purposes a valid passport, a necessary link in the logical chain seems to be missing unless it can be shown that the issue of a passport creates a legal duty of protection. For such a proposition there was before *Joyce's Case* no authority.

It is interesting to see how these difficulties were dealt with by the House of Lords. Lord Jowitt, L.C., whose speech in effect was the judgment of the House, at first accepted the thesis of counsel for the defence that duty is correlative to duty. 'The principle which runs through feudal law and what I may perhaps call constitutional law requires on the one hand protection, on the other fidelity, a duty of the sovereign lord to protect, a duty of the liege or subject to be faithful. Treason, "trahison", is the betrayal of a trust: to be faithful to the trust is the counterpart of the duty to protect.' It was held, however, that the Crown did owe a duty to Joyce. 'The possession of a passport by one who is not a British subject gives him rights and imposes upon the Sovereign obligations which would otherwise not be given or imposed. . . . By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects.' It will be seen that these words, while they assert that

a duty was owed to Joyce, attempt no argument in support of the proposition, but assume that it is proved by saying that protection was given to him in fact. The nature of the so-called duty of protection becomes even more mysterious when, in a later passage, Lord Jowitt says: 'The Crown in issuing a passport is assuming an onerous burden. . . . A well-known writer on international law has said . . . that by a universally recognised customary rule of the law of nations every State holds a right of protection over its citizens abroad. . . . It is true that the measure in which the State will exercise its right lies in its discretion'. This is surely an odd sort of legal duty if compliance with it is by law wholly discretionary. Can any parallel be found for such a concept?

In answer to an argument of the defence that Joyce was not within the protection of English law when he was in Germany, the noble lord looked to the history of the matter. 'At the time when the common law established between Sovereign Lord and resident alien the reciprocal duties of protection and allegiance it was to the personal power of the Sovereign rather than to the law of England that the alien looked. It is not, therefore, an answer to the Sovereign's claim to fidelity from an alien without the realm who holds a British passport that there cannot be extended to him the protection of the law.' If these words are taken literally all that is necessary in modern law to establish the duty of allegiance is receipt of protection from the sovereign in fact; notwithstanding Lord Jowitt's earlier words, there is no requirement, even verbally, of a duty of protection. It is submitted with the greatest respect that it is unsafe to argue in this way from remote legal history to modern law. We shall see in a later part of this paper the very curious consequences of attempting to do so.

We may now turn to the exceptional rule stated in Foster's *Crown Law* (1762 ed., p. 185), which before the decision in *Joyce* might have been regarded as doubtful, but was emphatically approved in that case. According to Foster an alien who settles in England and leaves it during war-time for his native country 'having a family and effects here' is subject to the law of treason; 'for though his person was removed for a time, his effects and family continued still under the same protection'. The reasoning with regard to the family seems to be based on the old view that wife and children are quasi-chattels in which a man has a kind of proprietary interest. One would have thought that this view would not be approved at the present day. Even with regard to chattels, it seems extraordinary to say that the possession of property in a country creates a duty of allegiance. It is true that the facts of the case (real or hypothetical) mentioned by Foster were of a special

type: they concerned an alien who settled in this country (not merely came as a visitor) and who left it during war. But the reason given for the ruling seems to go the whole length of saying that the mere fact that a man's belongings happen to be in a country subjects him to a duty of allegiance and consequently to the treason laws of that country. One can imagine that such a claim, if put forward by any other state in respect of a British subject, would be vigorously resisted by this country.

In view of these difficulties of principle with Foster's rule, one would have thought that the House of Lords would have scrutinised closely its weight as a legal authority. Foster attributes his rule to a resolution of all the judges assembled at the Queen's command in 1707. But, as Professor Hood Phillips has pointed out in a note upon *R. v. Joyce*, such a resolution is not binding.¹⁵ He quotes the words of Lord Camden, C.J., in *Entick v. Carrington* (1765),¹⁶ referring to the *Trial of Benjamin Harris* (1680).¹⁷ 'These are the opinions of all the twelve judges of England, a great and reverend authority. Can the twelve judges extrajudicially make a thing law to bind the Kingdom by a declaration, that such is their opinion? I say No. It is a matter of impeachment for any judge to affirm it. There must be an antecedent principle or authority, from whence this opinion may be fairly collected; otherwise the opinion is null, and nothing but ignorance can excuse the judge that subscribed to it.'

Since *R. v. Joyce*, Foster's exception must apparently be taken as established, but its precise limits can hardly be regarded as clear. Must there be both family and effects, or is one or the other sufficient? Does 'family' mean wife or children or both? Does the term include a wife living apart from her husband by judicial or voluntary separation? At what age, if any, do children cease to belong to the family? Must the alien himself have been formerly present within the dominions, or is the duty of allegiance created by the mere presence of his family and effects there? As to the last question, it is submitted that whatever the logic of the matter the exception must, as a matter of policy, receive a restricted interpretation and that it applies only where the alien was formerly present within the dominions. It will be argued later that a similar restriction applies to the rule in *R. v. Joyce*.

Another possible exception to the general principle of local allegiance was suggested by Lord Jowitt, obiter, in *Joyce*.¹⁸ This

¹⁵ Thomas and Hood Phillips, *Leading Cases in Constitutional Law*, 8th ed., 197.

¹⁶ 19 St.Tr. 1071.

¹⁷ 7 St.Tr. 929, 1127.

¹⁸ [1946] A.C. at 368-9.

was that where an alien quits his residence in this country temporarily and *animo revertendi* his duty of allegiance continues. For this suggested qualification on the general principle there was no previous authority.

This concludes the general discussion of positive protection. We turn now to negative protection.

3. NEGATIVE PROTECTION

Negative protection was defined above as the law-abidingness of the sovereign and his officers with respect to the individual subject. Protection in this sense means in English law the exclusion of the defence of act of state—that is to say, the defence established by *Buron v. Denman*.¹⁹ In fact this is not protection by the sovereign against third persons, but protection by the courts against the sovereign. The relevant rule of law declares not that the sovereign and his officers are under a specific duty of protection towards the subject, but that they are bound by the same general rules of crime and tort (with certain exceptions) as other subjects. On the part of the sovereign what is required is not so much protection as abstention from interference.

Notwithstanding what has gone before, it is evident that in this sense of the word 'protection' one cannot without some strain upon language speak of a duty of protection. It is hardly a duty of protection imposed on the sovereign, unless it can be said that the sovereign is under a duty to provide a system of courts to redress breaches of the law committed by his officers. But negative protection, though hardly a legal duty, is certainly a matter of law. It is a characteristic of a system of law whereby that system applies to the conduct of state servants in relation to the protected individual.

It may be said that protection of this sort is improperly introduced into a discussion of allegiance. In feudal times allegiance was given in return for the lord's protection against others, not in return for his own abstention from injuring his man. In reply it may be urged that negative protection is necessarily involved in positive protection. Protection against others is not of much value if it merely means that the person protected is reserved for spoliation by his lord. However this may be, the justification for introducing negative protection into the present discussion is that it is frequently

¹⁹ (1848), 2 Ex. 167. 'Act of state' is frequently employed in another sense to refer to the rules that no action can be brought in English courts on a treaty, and that when the Crown annexes a foreign state it does not, in English municipal law, succeed to the obligations of the former government. These doctrines are irrelevant to the present discussion.

regarded as a kind of protection for legal purposes. Thus, as we have seen, Professor Lauterpacht quotes *Johnstone v. Pedlar* (which was a case of what is here called negative protection) as a case on the 'protection of the law', and as relevant to a discussion of allegiance and protection.

Let us see, then, what correlation can be established between protection in this sense and allegiance. Negative protection exists where act of state is not a defence to the executive. The rule is that act of state is a defence where the wrong is committed by a state servant against an alien who is abroad at the time, provided that the act is authorised or ratified by the Crown. It is not a defence in other circumstances, and thus is not a defence against a British subject. In the words of Stephen²⁰: 'As between the sovereign and his subjects there can be no such thing as an act of state. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals'. This remark applies even though the subject happens to be abroad at the time of receiving the injury. Correlatively, a British subject anywhere in the world owes a duty of allegiance (and so can commit treason). It will be seen that in this respect the exclusion of the defence of act of state and the incidence of the law of treason are not merely correlative but geographically co-extensive. The same proposition holds for aliens, though here the extent is different. Act of state is no defence against an alien resident in the dominions of the Crown (*Johnstone v. Pedlar*), and correlatively he owes a local duty of allegiance and so comes within the law of treason (*De Jager v. Att.-Gen. of Natal*). But act of state is a defence against an alien when abroad, and correlatively he owes no duty of allegiance and is outside the law of treason.

These links between negative protection and the duty of allegiance are sufficiently striking to suggest the conclusion that in modern law the two are reciprocal constants. An authority against this conclusion that must be considered briefly is the case of *Commercial and Estates Company of Egypt v. Board of Trade*.²¹ The actual decision is not relevant, but there were certain obiter dicta on the question whether act of state can ever be a defence in respect of an act done on British soil. Suppose for instance that a Frenchman, generally resident in France, spends a holiday in this country, and when returning to France leaves his suit-case with a friend. The police seize the case and their act is ratified by the Crown. The Frenchman, still in France, instructs London

²⁰ *History of the Criminal Law* (1883), ii, 65.

²¹ [1925] 1 K.B. 271 at 290, 297. Cp. Winfield, *Textbook of the Law of Tort*, 3rd ed., 87.

solicitors to commence proceedings for the return of the case. Is act of state a defence? Let us look at it from the point of view of the correlation of allegiance and negative protection. The Frenchman, being an alien resident abroad, owes no duty of allegiance. Therefore there is no negative protection and act of state should be a defence. In the case just cited, however, two of the judges (Scrutton and Bankes, L.JJ.) thought that it would not be a defence. These dicta were obiter and were apparently not fully considered, and it is respectfully submitted that they are not conclusive.

Another case that at first sight causes difficulty with the correlation is that of the alien enemy. A person of enemy nationality resident in the dominions with the licence of the Crown owes a duty of allegiance: *De Jager's Case*. Yet it is sometimes said that act of state is a defence against him. It is submitted that this is too wide a statement. True, he may be interned at the pleasure of the Crown,²² and his property may be seized.²³ These rules give a very wide discretion to the Crown, but there still remains at least one thing that is not allowed: murder.²⁴ If act of state were a defence in respect of such a person, a servant of the Crown acting with official authority could legally execute him; but it is submitted that this is not so. One must conclude, therefore, that act of state is not a defence against an alien enemy resident here with the licence of the Crown, and the correlation of negative protection with the duty of allegiance remains intact.

Assuming that the correlation is valid, it seems to reinforce the objection to the decision in *R. v. Joyce*. Suppose that Joyce had been assaulted in Germany by a British officer acting under the authority of the Crown (whether in time of war or in time of peace makes no difference). It seems obvious that act of state would have been a defence against Joyce, and the fact that he had a British passport would have been irrelevant to that issue. This shows that there was no negative protection of Joyce when in Germany—that he was not within what Professor Lauterpacht calls ‘the protection of the law’. Therefore, on the correlation just suggested, he owed no duty of allegiance. That the possession of a British passport has nothing to do with negative protection seems to be shown by the case of British protected persons (the inhabitants of protectorates), for they are given British passports and yet act of

²² *R. v. Bottrill, ex p. Kuechenmeister*, [1947] 1 K.B. 41.

²³ *Re Ferdinand, ex-Tsar of Bulgaria*, [1920] 1 Ch. 107; McNair, *Legal Effects of War*, 2nd ed., 125.

²⁴ Although all the cases on act of state were actions in tort, it seems clear that the defence, so far as it applies, avails equally a person charged with crime. See Stephen, *History of the Criminal Law* (1883), ii, 61.

state is apparently a defence against them even when they are within the protectorate.²⁵

There is another view of the basis of the defence of act of state, which has gained wide acceptance and needs brief mention here. This is that the defence of act of state results from the doctrine of separation of powers. When a state servant acts in relation to a foreigner abroad, he is acting as an instrument of foreign policy, and foreign policy should be left to the exclusive domain of the Crown. As Holdsworth put it, 'the reason [for *Buron v. Denman*] obviously was that the Crown, by virtue of its prerogative over foreign affairs, has a free hand, subject only to the risk of provoking war, in its dealings with aliens outside the jurisdiction of English courts'.²⁶ This may seem to be a condonation of lawless action on the part of the Crown, but the excuse offered is that the alien is protected by his own government. This is said to be the explanation of the rule that act of state is no defence against British subjects, for 'such persons cannot obtain redress through diplomatic channels'.²⁷ To some extent the theory is an attractive one, and it helps to explain the origin and perpetuation of the defence of act of state in English law. Thus in *Feather v. The Queen* (1865),²⁸ Cockburn, C.J., justified the decision in *Buron v. Denman* on the ground that 'the private right of action becomes merged in the international question which arises between our own government and that of the foreigner'. The theory, however, does not completely explain the limits of the defence of act of state as they are set in the modern law. For an alien resident in England still has the diplomatic protection of his own country, and yet act of state is no defence against him; while conversely a British protected person has no foreign country to protect him (foreign affairs being in the hands of the Crown), and yet act of state is apparently a defence against him. These two examples, though they leave untouched the general proposition that *Buron v. Denman* rests on an idea of separation of powers, show that the defence is allowed to operate only outside the sphere of protection and allegiance defined by law.

²⁵ This is always assumed (e.g., by Wade and Phillips, *Constitutional Law*, 3rd ed., 309), though it seems not to have been expressly decided. The case usually cited is *R. v. Earl Crewe, ex p. Sekgome*, [1910] 2 K.B. 576, which turned not on the defence of act of state but on the Foreign Jurisdiction Act, 1890. The fact is that the powers given by that Act are so wide that the Crown does not need to rely on the common-law defence of act of state; but if the question ever arose it seems very likely that the defence would be sustained.

²⁶ Holdsworth, 'The History of Acts of State in English Law' (1941), 41 Col.L.Rev. at 1321. Cp. Lauterpacht, *The Function of Law in the International Community* (1933), 387-90; Dickinson, *Administrative Justice and the Supremacy of Law* (1927), 26-7.

²⁷ F. A. Mann, 'The Sacrosanctity of the Foreign Act of State' (1943), 59 L.Q.R. at 46.

²⁸ 6 B. & S. 257 at 296.

They show that in order to determine whether act of state is a defence we must ask not whether the plaintiff could obtain international protection from another state but whether he stands to the Crown in the special relation of allegiance and protection recognised by English law; and 'protection' for this purpose means not diplomatic protection but the technical duty of protection in English municipal law owed towards those who are under personal or local allegiance.

It must also be pointed out that even if the theory of the defence of act of state as resting on the possibility of international protection were a true reflection of the rules of English law, it would not assist those who support the decision in *R. v. Joyce*. The decision in *R. v. Joyce* on the question of allegiance did not turn on the fact that there was a state of war between Britain and Germany at the relevant time; the *ratio decidendi* would be applicable equally to one who obtains a passport in time of peace.²⁹ But it is clear that had peace existed between Britain and Germany, Germany would have been competent to defend Joyce by diplomatic action against Britain for any wrong done in respect of him after he became naturalised in Germany; and the United States (the state to which he previously belonged) would have been competent to defend him before he became so naturalised. The diplomatic protection of Joyce would have rested either with Germany or with the United States; it would not, if the fact of his nationality had been revealed, have rested with Great Britain. Thus, even on the faulty view of the defence of act of state now being supposed, the defence would have availed in respect of anything done to Joyce. Consequently, even on this view, any negative protection in English municipal law is disproved.

[We must now face a somewhat different objection to the theory here presented. It may be said that the theory is guilty of an anachronism in linking the duty of allegiance with the doctrine of act of state. The rules relating to act of state are of comparatively recent development, and it cannot be these rules that are referred to when it is said that allegiance is correlative to protection. In feudal times the duty of allegiance arose because the lord undertook the task of protecting his man against others — against neighbours in the lord's courts and against outsiders by military force. There is no question of protection against the lord himself.

To this it may be replied that, whatever the position in ancient

²⁹ Of course the form of treason with which Joyce was charged presupposed a state of war. But the decision on the question of allegiance would be applicable to other forms of treason capable of being committed in time of peace.

times, the 'protection of the law' against others than the sovereign and his servants cannot now be made the test of the duty of allegiance. Let us consider again the illustration of the Frenchman and his suit-case, putting the difference that the suit-case is seized not by a state servant but by a private individual without official authority. It is evident that on such altered facts the Frenchman would have a remedy. As against all save (possibly) the Crown and its servants the Frenchman is, in respect of his property in England, within the protection of English law. Yet he owes no duty of allegiance. Thus either the protection of the law is not now a test of the duty of allegiance, or the protection of the law for this purpose now means one thing and one thing only, namely protection against the sovereign. Arguments to the contrary based on feudal concepts must be dismissed as pure antiquarianism.

Now that *R. v. Joyce* has been decided and has passed into law, it may possibly have some repercussion on the defence of act of state. If negative protection is geographically co-extensive with the duty of allegiance, it would follow that any change in the geographical extent of the duty of allegiance must bring about a corresponding change in the extent of negative protection. This would mean that where an alien departs from the realm (a) with a British passport or (b) leaving a family and effects behind him or (perhaps) (c) temporarily and *animo revertendi*, act of state is no defence against him even in respect of an injury done to him while he is abroad. If this conclusion is not accepted it follows that negative protection and the duty of allegiance cannot now be regarded as co-extensive.

4. THE CORRELATION OF ALLEGIANCE AND PROTECTION IN RELATION TO BRITISH PROTECTED PERSONS

The application of the foregoing principles to British protected persons needs special treatment. A British protectorate is not British soil, and the mass of its inhabitants (British protected persons) are not British subjects. Therefore, it is supposed, act of state is a defence in respect of an act committed by a state servant with the authority of the Crown against a protected person in a protectorate. There is no negative protection of British protected persons.

If there is no negative protection—if such persons are outside the protection of the English law of crime and tort in respect of conduct of the executive—it would seem to follow *a fortiori* that the executive is under no duty of positive protection in respect of them. It would be odd if the sovereign were under a legal duty to protect an individual against third persons when neither the

sovereign nor his officers are bound by any rules of municipal law in their dealings with such individual.

There is a further argument leading to the same conclusion. As we have seen, it was held in *China Navigation Co. v. Att.-Gen.* that the Crown is under no duty of positive physical protection on foreign soil. Now a protectorate is foreign soil. It would seem to follow that the Crown does not owe this duty even to a British subject within the protectorate. If the duty is not owed to British subjects, with much stronger reason is it not owed to British protected persons.

If it is true that there is neither negative protection nor a duty of positive protection towards a British protected person, it seems to follow that the protected person owes no duty of allegiance to the British Crown, and so cannot be guilty of treason by English law. (He may, of course, be guilty of an offence of treason under the domestic law of the protectorate, but that is another question.) There is no English authority against this view. It is true that there is a well-known South African case (*R. v. Christian*³⁰) deciding that the inhabitant of a C Mandate owes a duty of allegiance, and true also that in municipal law there is no important difference between a mandate and a protectorate. But *R. v. Christian* has not been considered in English courts and the question cannot (at any rate could not before *R. v. Joyce*) be regarded as finally settled. Professor Lauterpacht himself shrinks from saying that the inhabitants of protectorates owe a duty of allegiance.

There are one or two arguments against the suggested conclusion that deserve consideration. First it may be objected that the foregoing discussion neglects the diplomatic protection of protected persons. A protected person who wishes to travel abroad obtains a British passport as a British protected person and is diplomatically protected. This, however, is not an argument of significance in municipal law. Neither passports nor diplomatic protection are in any relevant sense the concern of municipal law.³¹ It is necessary

³⁰ [1924] A.D. 101.

³¹ There is a surprising dearth of judicial authority on the question whether passports are recognised by English law in the sense that a British subject who wishes to leave or enter this country must have a passport. It seems clear that he may legally enter without one (though he will find practical difficulty if he attempts to do so). As for leaving the realm, it is alleged by some writers that this was originally prohibited at common law in the absence of a royal licence, because it deprived the King of a man's military service. This statement is made by J. W. Hall, *Trial of William Joyce*, 27; but the only authority quoted is the *Shorter Oxford Dictionary*, s.v. 'Passport', which does not bear it out. The same statement is made by T. B. Ross in an article, 'Passports' in (1934), *Scots L. T.* 85, but again no authority is cited except a remark of Sir Leoline Jenkins in a letter to Sir William Temple (*Life of Jenkins* ii, 313, quoted in Phillimore, *International Law*, 3rd ed. (1879), 447). Ross indeed refers to an Act of 1381 (5 Ric. 2, st. 1, c. 2, s. 2), which forbade

to insist again that what matters in English law is protection in law, not protection given in fact, and protection in law comes before the courts only in connection with the doctrine of consideration and the defence of act of state. The cases both on consideration and on act of state lead to the conclusion that there is no protection in English law of British protected persons, however paradoxical this conclusion may seem. The protection given to British protected persons when travelling abroad is a matter of fact or a matter of international law, not a requirement of municipal law.

A second objection to the view here advanced is that the protected person is in fact protected, not only diplomatically when travelling abroad, but also by the operation of the courts of law against his fellow-citizens in the protectorate. At any rate in the case of a protectorate or mandate administered under the Foreign Jurisdiction Act, the inhabitant is protected in his life, liberty and property by the Crown which has set up courts operating under English law. This day-to-day protection within his own society and under English law is sufficient, it may be said, to create in the inhabitant a corresponding duty of allegiance to the Crown.

There is some persuasiveness about this argument (though it has to face the difficulty stated in the counter-argument on page 68). If accepted, it serves to support the decision in *R. v. Christian*. But it seems much more doubtful whether it supports the decision in *R. v. Joyce*. Even if protection given under the

all persons with certain exceptions to leave the realm without licence; but this Act was repealed in 1606 (4 Jac. 1, c. 1, s. 22) and again, to make doubly sure, by the S.L.R.A. 1863. The rule in question thus appears to have been created not by the judges but by a statute that has long since been repealed.

A more reliable authority on the common law is Blackstone (*Comm.* i, 265). He states that every one may go abroad without leave of the King, but that this right may be taken away by royal writ (*ne exeat regnum*). He does not state whether the writ can be addressed to subjects at large or only to individuals, but in practice it seems always to have been used against named individuals only. See, e.g., the instance of the writ in 3 Co.Inst. 179. In any event the writ *ne exeat regno* (as it was later called) came to be used only as a judicial writ directed against absconding debtors. The Crown has not for many centuries attempted to issue a general prohibition against leaving the realm, except during war (in the late war it was done under the emergency legislation), nor even an individual prohibition except by judicial process against debtors. See now, as to the last, Crown Proceedings Act, 1947, s. 31 (2).

This view of the law is borne out by Ridges' *Constitutional Law* (ed. Keith), 152, 309, 383. The Crown's power to impose a general prohibition on exit seems in this work to be confined to war-time; in peace-time the Home Secretary may restrain an individual from leaving the kingdom by the writ *ne exeat regno*, but this seems to be confined to individuals and to be confined now to defaulting debtors. 'Thus, in March, 1937, the Crown had no power to forbid a number of clergymen leaving England to investigate religious conditions in Spain, though they were refused any recommendation to the good offices of the British representatives therein'.

It follows from all this that passports obtain legal notice only in connection with such matters as the forgery of passports. See Halsbury, *Laws of England*, index s.v. 'Passport'.

powers of the Foreign Jurisdiction Act creates a duty of allegiance, it is a long step from that to say that the possibility of diplomatic protection against foreign powers creates a duty of allegiance.

Looking to the future, since we now have to accept the decision in *R. v. Joyce*, it is possible that the courts will, on an argument 'a fortiori', hold that British protected persons are under a duty of allegiance, and this in turn may possibly have the repercussion that the defence of act of state will not be pleadable against British protected persons. The courts may even feel themselves committed to holding that the inhabitants of protected states not administered under the Foreign Jurisdiction Act owe a duty of allegiance, for the passport argument applies equally to them.

Professor Lauterpacht naturally feels uncomfortable about such a sweeping deduction from the *Joyce Case*, and he therefore suggests a distinction. *Joyce*, he says, obtained diplomatic protection by his own voluntary act, whereas a British protected person does not; and it is only where an alien obtains protection by his voluntary act that there is adequate reason for bringing about a duty of individual allegiance.³² The answer to this is that the usual occasion for diplomatic protection is when a person is abroad; and if a British protected person is travelling abroad this means that he has applied for a British passport, which is his own act. One can, of course, draw a distinction between protected persons possessing passports and those who do not, and say that the former can commit treason while the latter cannot. Or one can distinguish between acts done within the protectorate and acts done abroad, saying that a British protected person can commit treason while travelling abroad with a passport but not when home again in the protectorate. However, distinctions of this kind would not commend themselves to many.

The argument based upon *Joyce's Case* does not stop here. If diplomatic protection is enough in itself to create a duty of allegiance, it would seem not to be necessary that the person protected should have a British passport. The former Prime Minister of a state that has just undergone a revolution resulting in a dictatorship appeals to Great Britain for protection. As a result of British diplomatic pressure he is granted permission to leave his

³² *Op. cit.* 341. The sentence runs: 'In the case of "protected persons"—such as those from a protectorate or mandated territory—the diplomatic protection which they obtain is not due to any voluntary act of their own (which alone in the case of aliens is an adequate reason for bringing about a duty of individual allegiance), but to a situation which is in the nature of an internationally recognised arrangement in respect of territories which have no *locus standi* of their own in the international sphere'. Cf. the words of Lord Jowitt: 'By his own act [*Joyce*] has maintained the bond which while he was within the realm bound him to his Sovereign' ([1946] A.C. at 370).

country. According to the argument used in *Joyce's Case* the intervention by Britain would impose on the individual so protected a duty of allegiance to the British Crown. Such an argument in this application would be patently absurd, but it is not easy at first sight to see the distinction from its application in *Joyce's Case*. Professor Lauterpacht's suggestion that the rule is confined to cases where the protection is sought by the individual does not help, for in the case put protection has been sought.

Some distinction between the two cases must, however, be found, and it is suggested that it may be found by saying that the hypothetical Prime Minister, though he receives British diplomatic protection, does not receive it as a continuation of 'domestic' protection received while he was resident in British territory. Joyce, on the other hand, was originally resident in England, and the diplomatic protection he received was an 'extension' of the protection that he originally enjoyed under the domestic law of England. The distinction is admittedly an unconvincing one, for it is not easy to see why the legal view of what an alien does in a foreign country should be affected by the question whether at some time in the past he sojourned in British territory. It is, however, supported by several remarks in Lord Jowitt's speech. Lord Jowitt began by saying that the alien owed allegiance from the day when he came within the realm, and that the question for decision was when he cast it off. The question was 'whether [on the facts] there was not such protection still afforded by the sovereign as to require of him the continuance of his allegiance. The material facts are these, that being for long resident here and owing allegiance he applied for and obtained a passport and, leaving the realm, adhered to the King's enemies. . . . By his own act he has maintained the bond which while he was within the realm bound him to his Sovereign. The question is . . . whether by [the receipt of the passport] he extended his duty of allegiance beyond the moment when he left the shores of this country. . . . By the holding of a passport he asserts and maintains the relation in which he formerly stood, claiming the continued protection of the Crown and thereby pledging the continuance of his fidelity'. These expressions seem to indicate that an alien who obtains a British passport or British diplomatic protection without ever having set foot in the territorial dominions of the Crown, or otherwise than as a continuation of protection received when within the dominions, is not within the *ratio decidendi* of the case. If this is so, *R. v. Joyce* is an authority only on its very narrowest facts. It can therefore be distinguished in a case like *R. v. Christian*, for it may be said that residence in a C Mandate or protectorate is not

legally the same as residence in British territory. Whether the courts will distinguish it on this ground remains to be seen.

It may be pointed out that if the foregoing interpretation of the decision in *Joyce* is correct, it becomes even more evident that the decision involves a change in the previous law. The decision can be represented as a mere application of existing principles only if it is a logical deduction from the correlation of allegiance and protection. But if it were a logical deduction from this correlation, the rule would be that every receipt of diplomatic protection creates a duty of allegiance. This, it is suggested, is not the rule. The rule is that an alien who, having received one kind of protection, loses this protection but goes on receiving another kind (which other kind would not in itself create a duty of allegiance) has his duty of allegiance continued. It seems clear that this rule is not a logical deduction from the correlation of allegiance and protection. It is an extension, not an application, of the law.

5. PROTECTION AND PASSPORTS

So far we have assumed that in modern law before *Joyce's Case* the duty of allegiance corresponded either to the duty of positive protection or to negative protection under the law. Let us suppose that this assumption is wrong and that protection in fact—even diplomatic protection—is enough at common law to create a duty of allegiance. There is still one weakness in the decision in *Joyce*. The judges assumed—and it was an essential step in the reasoning—that possessing a British passport is equivalent to receiving British protection. This equation may, with respect, be doubted. The extensive use of passports is a comparatively modern novelty, but diplomatic protection is a practice of long standing. Even at the present day, protection is not conditional upon the possession of a passport. If a British subject were to be kidnapped from England by aeroplane without a passport, and were then ill-treated by a foreign government abroad, there seems little doubt that his fate would be a matter of diplomatic concern to this country. Conversely, the possession of a British passport is not enough to ensure diplomatic protection. *Joyce* did not in fact obtain diplomatic protection under his passport, because he did not need it; but even if he had needed it he would not have obtained it if the true facts had come to light in time. The most that can be said is that he might have used his passport as evidence for the purpose of obtaining protection. But then he might have used other evidence instead—a forged passport, a birth certificate, false evidence of having lost a passport, false evidence of having been kidnapped from England without a passport, and so on. One must not confuse the evidence

by which one prevails on the Crown to intervene diplomatically on one's behalf with the diplomatic protection itself. Yet that is what *Joyce's Case* appears to do.

Professor Lauterpacht, following the language of the judges, sometimes speaks as though Joyce in fact obtained protection from the Crown.³³ Yet at other times, evidently realising the objection to this mode of statement, he says merely that Joyce asked for protection.³⁴ With respect, even this is not true. Joyce did not, in the ordinary use of language, ask for protection. He asked for a passport. The reason was that he wanted to get to Germany, and he could not leave England without a passport from someone. It is probably not too much to say that the question of diplomatic protection did not enter his head. Just as, in the nineteenth century, one could ask one's government for diplomatic protection without asking for a passport, so, in the twentieth century, one can ask for a passport without asking for protection. In *Joyce's Case* no occasion for protection had arisen, so there was no need for Joyce to ask for it. To say that asking for a passport is the same as asking for protection of which one does not think is to create a fiction that should find no place in the criminal law.

This aspect of the matter may be put rather differently by pointing out that a passport serves a double purpose. Primarily it is, as its name implies, a document enabling the bearer to move about the world. A British subject needs one to leave England because it will be required by the country of destination, and that country will require it not because it wishes to see that the British subject is diplomatically protected by his government but because it wants an acknowledgment by Britain that the man is a British subject who will be received back. Second, a British passport is according to its wording a request from the Crown for protection for its bearer. The language is somewhat general, but may, perhaps, be interpreted as a request to British diplomatic agents to protect the bearer. Most people when they apply for a passport think of its first function, which in practice is much the more important. In its second function the passport is at best a request for protection, not protection itself. The bearer of a passport has a document that

³³ *E.g.*, *op. cit.* 335: 'Joyce caused the continuation, in a different sphere, of the protection hitherto extended to him by the law'; 341: 'an alien . . . continues to owe allegiance if on leaving the realm he applies for and obtains the continued protection of the Crown'.

³⁴ *E.g.*, *op. cit.* 341; 'The consequential duty of allegiance is the result of his voluntary act in asking for a continuation abroad of . . . protection. [The decision] was that "by the holding of a passport he asserts and maintains the relation in which he formerly stood, claiming the continued protection of the Crown and thereby pledging the continuance of his fidelity"; [1946] A.C. at 371'.

requests protection; it does not necessarily follow that he is protected.

It may be said that these objections to the decision in *Joyce*, even if conceded, are pure technicalities. But it must be remembered that the legal reasoning advanced for the decision was, in the same sense, pure technicality. Joyce could not have been convicted of treason except as a result of a legal argument based on the correlation between allegiance and protection. But for this argument, it is conceded on all sides that no reason of policy would have justified the judges in stretching the existing law of treason to cover Joyce. It has been the endeavour of this paper to show, with every respect, that the legal argument was faulty because based on a misapprehension of the meaning of the word 'protection'. If this is true, the basis of the decision slips away.

We may conclude with a word about the merits of the rule in *Joyce's Case* as a rule of law. *Quod fieri non debet, factum valet*. Whatever quarrel one may have with judge-made criminal law, this particular objection ceases for the future as soon as the law has been made. If facts akin to those in *Joyce* ever arise again, there will be no objection to following that decision on the score of retroactive legislation. There may, however, be other objections. Suppose that the facts of *Joyce's Case* were to recur with the difference that the accused, though believing himself to be British when he applied for the British passport, had spent practically the whole of his life in Germany and was in reality of German nationality, as he subsequently discovered when summoned to military or other service in Germany. It seems evident that this change in the facts would completely alter our emotional attitude to the accused. Yet the rule in *Joyce's Case* compels us to convict such a person of treason equally with Joyce. The reason why Joyce's conduct was particularly repulsive was that he voluntarily sided with Germany after an Anglo-American upbringing and education; yet these circumstances form no part of the *ratio decidendi*. The decision, therefore, extends the trouble arising from the unfortunate area of the law known as double nationality. Double nationality is objectionable because it subjects a man to different and often conflicting allegiances. Since *Joyce's Case*, the evil is extended even to cases of single nationality where an alien is unhappy enough to possess a British passport, and perhaps even where, departing hurriedly from this country on the outbreak of war, he leaves behind a few personal effects.

SUMMARY

The legal rules resulting from this somewhat involved discussion may be summarised as follows.

1. A duty of allegiance is owed by :

- (a) a British subject wherever he may be ;
- (b) an alien (other than a member of an invading force ³⁵) who
 - (i) is within the dominions of the Crown ; or
 - (ii) having once been within the dominions, has left them
 - (a) with a British passport, or (β) leaving a family and effects behind, or possibly (γ) temporarily and *animo revertendi*; or
 - (iii) (possibly) is a British protected person.

2. The Crown owes a duty of positive protection to all within the dominions, whether British or alien, except members of an invading force. It does not owe such a duty to anyone outside the dominions, except possibly those in protectorates and mandates (or territories under trusteeship) governed under the Foreign Jurisdiction Act.

3. 'Negative protection' is a term here used to signify the exclusion of the defence of act of state. Negative protection is enjoyed by :

- (a) a British subject wherever he may be ;
- (b) an alien (other than a member of an invading force) who
 - (i) is within the dominions of the Crown ; or
 - (ii) (possibly) having once been within the dominions, has left them (a) with a British passport, or (β) leaving a family and effects behind, or possibly (γ) temporarily and *animo revertendi*; or
 - (iii) (possibly) is a British protected person.

³⁵ The phrase used by Lord Jowitt is 'open enemy': [1946] A.C. at 368.

TENANCY OF PURCHASER (*Digest* 19.2.21)

By DAVID DAUBE

JAVOLENUS libro undecimo epistularum. Cum venderem fundum, convenit ut, donec pecunia omnis persolveretur, certa mercede emptor fundum conductum haberet: an soluta pecunia merces accepta fieri debeat? respondit: bona fides exigit ut quod convenit fiat: sed non amplius praestat is venditori quam pro portione eius temporis quo pecunia numerata non esset.

Here is *Monro's* comment¹: 'Under the circumstances last mentioned (*i.e.*, where A sells B an object, B engaging to hold it as tenant till he has paid the purchase money), in the case of land, B in time pays the purchase money, and the question asked apparently is: Can he then require to be released from the obligation to pay rent? The answer is: No; still he only need pay in proportion to the time of his delay in paying the purchase money, but as that was all he promised to do I do not understand the answer'.

It may be worth while to attempt an explanation of this fragment. It will be suggested that it deals with a real little problem which classics and Byzantines, or different classical jurists, decided in opposite ways.

The kind of case Javolenus has in mind is this: A sells B a piece of land. It is arranged that payment of the price should be completed by a date, say, five years after the sale; and provision may be made—though this is not essential—for part-payments before that date. It is further arranged that, during those five years, B should hold the land as tenant at a certain rent. B, however, pays the full price within two years. Is he to be released from rent for the remaining three?

Little or no alteration of the present text is needed to make it refer to this case. It is obvious that the contract of sale discussed by Javolenus fixes a date (it need not, of course, be five years) by which the land must be paid for in full. Without such a date the buyer need never pay—an impossible agreement. As appears from 19.2.22*pr.*, the fragment immediately following, the compilers even took it for granted that there was a *lex commissoria*, a clause to the effect that if the buyer failed to pay in time the vendor might

¹ *Digest* XIX. 2, 1891, p. 30.

declare the sale void.² We need not go so far, but, clearly, a date for paying up is fixed.

It is equally obvious that there is room for part-payments before the final date. The latter is described as the moment when '*pecunia omnis persolveretur*', 'the whole money is completely paid', which implies that there may, though there need not, be moments when only a portion is paid. As a matter of fact, we know that it was usual in sales of this type—where the vendor delivers the object, granting time for payment of the price and retaining ownership—for the buyer to make interim payments.³ They might assume various forms: the price might be payable in five yearly instalments, beginning one year after the sale, or there might be one payment on account at the time of the contract, the rest to be paid five years later, and so on. It has been alleged that the verb *persolvere* is mostly, if not always, due to interpolation.⁴ But while it may be rational to boggle at it where it merely stands for *solvere*, 'to pay'—the Byzantines were fond of imposing words—surely it is in its proper place where, as here, it has its full force, signifying 'to pay completely', 'to pay up'.

The only part of the case which one would like to be set down in greater detail is the question, '*an soluta pecunia merces accepta fieri debeat?*'. One might prefer it to run: '*On payment of the purchase money before the term laid down in the agreement is up, ought a release of the rent to be given?*'. It is, indeed, the absence of some such phrase which accounts for Monro's assumption that the price is being paid at the end of the term, when no problem whatever would arise. Once Monro had come to this assumption, he was right in pronouncing the entire fragment pointless.

Maybe a few words which appeared in the original discussion have dropped out. It is far more probable, however, that Javolenus expected his readers to understand without being explicitly told. They knew the kind of agreement, they knew that, if payment took place at the end of the term, no further rent could possibly fall due and it would be absurd to ask whether there should be release from it, and they would easily conclude that '*soluta pecunia*' must mean 'as soon as the price is paid, whenever that may occur', or 'on

² Paulus. *Item si pretio non soluto inempta res facta sit, tunc ex locato erit actio*. The meaning is that annulment of the sale in exercise of the right under a *lex commissoria* does not entail annulment of the lease combined with it.

³ *Vatican Fragments*, 3, is particularly suggestive: *Venditor qui legem commissoriam exercere noluit ob residuum pretium iudicio venditi recte agit*. The text considers only the normal case where, by the final date, only a residue remains to be paid.

⁴ See Heumann, *Handlexikon zu den Quellen des römischen Rechts*, 9th ed., by Seckel, 1907, p. 425. The fragment under notice is not considered; nor 43.26.20, on which some remarks will be made below, in an Addendum, with '*universum pretium persolvere*'.

payment of the price in the middle of the lease'. Javolenus is not given to wasting words: his Latin has been characterised as 'pura, tersa, castigataque' by one scholar, as 'pregnant' by another.⁵

Let us then consider the *prima facie* arguments in favour of either party. For A it might be said that he may claim his full rent, on the basis of the *locatio conductio* concluded, which is for, say, five years. True, B paid the price due under the *emptio venditio* sooner than necessary. But this, it might be held, is a different matter, with no bearing on the other contract. In any case, what A wanted, and what he was promised, is not an early payment of the purchase money but the purchase money plus the full rent for five years.

For B it might be said that he is entitled to discharge from the rent for the remaining three years on two grounds. First, it would be generally unfair to exact rent from him now that he has paid for buying the land. Secondly, as the land has become his (at least bonitary ownership has become his) on payment of the price, the principle that you cannot hire your own thing should come into play.

How would a fairly early classical lawyer have viewed these points? He must have found A's position very strong. A has the agreement on his side, the agreement reasonably interpreted in accordance with the wording. Of the first argument in B's support, Javolenus cannot have thought much. It rests on too vague a notion of fairness. In all probability the second one provided the real interest of the case. Yet it is unlikely that Javolenus regarded it as conclusive.

You cannot hire your own thing. This principle is a consequence of the fact that, where the object in question is yours, it is from the outset impossible for anyone to maintain you in enjoyment: you are installed already. Does it follow that, if you acquire a thing while its tenant—an instance of what is technically called *concursum duarum causarum*—the contract terminates or, at any rate, there must be release from future rent? Manifestly, from the moment of acquisition it is no longer the lessor by whom enjoyment is provided, it is yourself. None the less, the answer is not an unconditional 'Yes'. What happens depends on the particular situation.

1. No doubt, if I let you a house for five years, and after two sell and transfer it to you, no further rent will be due. Why not? Quite apart from the principle mentioned, there is implied in our new transaction an understanding that the lease should come to an end; in fact, *two pacta de non petendo*. But the case of 19.2.21 is not analogous. Sale and lease are here concluded at the same time;

⁵ See Kalb, *Roms Juristen*, 1890, p. 52, quoting Jenichen and Gradenwitz.

a date is fixed by which the purchase money must be paid, and B, the buyer, hires the land for the time between now and that date. It would be fanciful to read into this arrangement any pacta should ownership pass before the term is over: that contingency is simply not considered. It might perhaps be argued that it is by accepting the complete price before the date originally fixed that A tacitly waives his right to future rent. But there is no justification for such a proposition. He may have good reasons for accepting the money though he wishes the lease to go on. He certainly transgresses no rule in doing so, whereas a refusal of the tender, if very unreasonable owing to special circumstances, might even put him in mora.

2. If I let you a house not belonging to me for five years, and after two the owner dies leaving it to you by legacy, I can claim no further rent from you.⁶ Why not? You cannot hire your own thing. More precisely, there has been *concursum duarum causarum*, with the result that I am no longer supplying the house: you now hold it, not by virtue of your lease, but as owner (*civil or bonitary* ?). As tenant, you have, so to speak, been evicted, namely, by yourself, the owner. An evicted tenant does not continue paying rent, so you do not continue paying rent for what has become yours. But, again, 19.2.21 is not an exact parallel. The essential difference will become clear when we have examined a third possibility.

3. If I let you a house not belonging to me for five years, and after two you buy it from the owner and have it transferred to you, apparently (the evidence is slender) my right to rent goes on.⁸

⁶ 19.2.9.6 and 19.2.10. Ulpianus. Si alienam domum mihi locaveris, eaque mihi legata vel donata sit, non teneri me tibi ex locato ob pensionem: sed de tempore praeterito videamus si quid ante legati diem pensionis debetur: et puto solvendum. Julianus. Et ego ex conducto recte agam vel in hoc ut me liberes. The two fragments raise several difficulties into which, however, it is not here necessary to go. On some points concerning the former, see the following two footnotes.

⁷ In 19.2.9.6, the legacy contemplated seems to be per vindicationem, conferring civil ownership.

⁸ Professor Buckland, in his lectures, did not think so. The view here taken rests, above all, on 19.2.9.6, cited above, footnote 6. Ulpian says that I can claim no further rent if the house becomes yours as a result of a legacy. There is an interpolation, 'vel donata', extending the decision to other gratuitous acquisitions, no doubt correctly. Any reference to purchase, however, is conspicuously omitted. It may also be noted that, as to the analogous case where a buyer from a non-owner subsequently purchases the object from the owner, Nerva the Elder (prior to Javolenus, it is true, and belonging to the rival school) was of opinion that the non-owner must still be paid. Admittedly, by the time of Celsus the Younger (slightly later than Javolenus and, like Nerva, a Proculian), this was no longer undisputed. 21.2.29^{pr.} Pomponius. Si rem, quam mihi alienam vendideras, a domino redemerim, falsum esse quod Nerva respondisset posse te a me pretium consequi ex vendito agentem, quasi habere mihi rem liceret, Celsus filius aiebat, quia nec bonae fidei conveniret et ego ex alia causa rem haberem. See the following footnote for the probable significance of the first of the two arguments advanced by Celsus, and below, towards the end of the article, on the possibility of a similar classical evolution in connection with the problem of 19.2.21. Monro's note on 19.2.9.6, *op cit.*, p. 9, opens well but soon goes astray.

Why? Why is the principle that you cannot hire your own thing not applied to this case as it is to the one just discussed? Why is it not deemed relevant that you, not I, are now providing the thing? The rule, like so many in the title *Locati Conducti*, follows from a consideration of *bona fides*. Where, as in case (2), you get the object as a result of a legacy, the initiative was not taken by you, and there is no reason why you should not be allowed every advantage of your new position as owner. In contradistinction, in the present case, you acquire as a result of a purchase, that is to say, a transaction deliberately negotiated. It would be contrary to good faith to avail yourself of the position thus attained to end our contract prematurely. When we made the contract you undertook to pay me rent for five years; you cannot evade this liability by going and buying the object from a third party during your tenancy. Certainly, exceptional situations are conceivable where the step would be in order; for example, if the owner had threatened you with eviction. On such facts, presumably, I could no longer sue you for rent. But normally good faith will not permit you to plead acquisition on the ground of purchase, which was your own doing.

It is evident that the case put by Javolenus is closer to (3) than to (2). B, the buyer of A's land, is to hold it as tenant for the five years (or whatever period was fixed), at the expiry of which he undertakes to complete the payment of the purchase money. However, he pays all within a shorter time, say, two years. This, indeed, makes him owner (*bonitary* at least) of the land, but he has become owner not like the tenant of case (2), through another person's munificence, but like the tenant of case (3), through a transaction planned by himself. It follows that Javolenus would hardly have admitted the operation in his favour of the principle that you cannot hire your own thing. An appeal to this principle is excluded by the overriding demands of *bona fides*.

As the text stands, to be sure, the obligation to pay rent is held to cease the moment the purchase money is fully paid. But it is not unlikely that the original decision is contained in the single, brief proposition: '*bona fides exigit ut quod convenit fiat*'. In other words, the question 'On payment of the price before the term is up, ought a release to be given?' was answered by Javolenus in the negative, without any reservation. No release ought to be given. B has hired the land for five years, and good faith requires that he should stand by his word.⁹ He cannot get rid of his duty by an

⁹ It is tempting to assume that Nerva also, when he delivered the analogous decision quoted in the preceding footnote, supported it by an express reference to *bona fides*: the first of the two points of Celsus in favour of the opposite view may well have been meant as a direct repudiation, something like 'It is not true that this is required by *bona fides*'.

earlier performance of his part in the *emptio venditio*, even though that renders him owner.

If we take this as the opinion of Javolenus, we have still to explain the conclusion of the fragment, from '*sed non amplius*', which completely reverses it. The most probable solution is that the Byzantines attached great importance to that ill-defined argument of which it was remarked above that Javolenus cannot have taken it seriously, *i.e.*, the feeling that it would be generally unfair to exact rent from B after he has paid up for the land. The Byzantines inclined to 'benign' decisions, decisions expressing not a restrained and logical equity fitting the nature of the case but an uncritical, emotional tenderness to 'the loser'. The letting off of the tenant in the present case looks like an illustration of this tendency.

There exists, however, another possibility. In the domain of *concursum duarum causarum* we come across much development, controversy and wavering even within the classical age. The subject bristles with unsolved difficulties, and it would lead too far afield here to enter upon it. It must suffice to point out that the discrepancy between the main body of the text and its conclusion may reflect a difference of opinion between various classical lawyers.¹⁰ Indeed, it is just conceivable that the concluding sentence, though clumsily appended by a writer later than Javolenus, yet embodies a very early doctrine.

In the first part of the fragment it is 'I' who am selling: '*cum venderem fundum*'. In the portion here suspected of being an addition it is 'the vendor': '*sed non amplius praestat is venditori*'. Overmuch attention need not be paid to formal inconsistencies of this kind: they are known to occur in the works of the most brilliant interpolationists. They do gain in significance, however, where, as in this case, corruption is suggested by the substance of a text.

ADDENDUM

An explanation of 19.2.21, to be convincing, must square with 43.26.20, where a similar agreement is presupposed: Ulpianus. *Ea quae distracta sunt ut precario penes emptorem essent quoad pretium universum persolveretur, si per emptorem stetit quo minus persolveretur, venditorem posse consequi.*

A sells B an object. A date is fixed by which payment must be completed. There may also be the usual arrangement for one or several interim payments, but this does not matter. Till the final

¹⁰ It would somewhat correspond to the difference between Nerva and Celsus, commented on above, footnote 8. For literature, see Buckland, *A Textbook of Roman Law*, 2nd ed., 1932, p. 563, n. 11.

date ('quoad pretium universum persolveretur') B may hold the object precario. Clearly, this is the same agreement as in 19.2.21, except that there is precarium instead of lease.

The sequel, however, is different. In 19.2.21 the buyer-tenant pays up before the date fixed, and the question arises whether he should be released from future rent. Here the final date passes without a full settlement ('quo minus persolveretur').

What Ulpian desires to convey seems to be that the vendor may avail himself of the interdict de precario only if the buyer-precario tenens is in mora; but that if he offered performance, or if he was prevented from offering it through no fault of his own, the vendor, though still owner of the object—which has not yet been paid for in full—can no longer recover it. The point of the decision would no doubt come out much more clearly were we told, not that the interdict lies if there is mora, but that it does not lie if there is none. But this is a responsum, and the formulation which strikes us as awkward may well have been determined by the formulation of the question submitted to Ulpian, but lost to us.

In any case, a comparable idea may be found in 43.26.11: Celsus. Si debitor rem pigneratam precario rogaverit, soluta pecunia precarium solvitur. It may be taken as established that 'rem pigneratam' was substituted by the compilers for 'fiduciam'.¹¹ A creditor allows his debtor to hold precario an object pledged by way of fiducia. The debtor settles his debt, and it is held that the creditor can no longer use the interdict de precario, though still owner—fiduciary owner—of the object.¹²

¹¹ See the modern editions of the *Digest*, accepting Lenel's reconstruction.

¹² The writer is indebted to Professors P. W. Duff, of Cambridge, and Hugh Last, of Oxford, for valuable advice.

THE COUNTESS GUNDRED'S LANDS¹

By S. J. BAILEY

THE Countess Gundred was an occasional litigant in the Curia Regis Rolls of Richard I and John. She was evidently an important person. Other women are described in the rolls as the wife or widow or daughter of someone: she is simply 'Comitissa Gundreda' (*Comitiss Gundr*) without more. She was probably the daughter of Roger, Earl of Warwick,² and was perhaps a great granddaughter of William the Conqueror.³ Her first husband was Hugh Bigod, first Earl of Norfolk⁴; her second was Roger de Glanvill, brother of the Justiciar.⁵

Those rolls of King Richard's court which still survive have been printed.⁶ Unfortunately they are few and intermittent: the earliest are from the year 1194. Gundred first appears as a litigant in 1196⁷; and her second husband is already dead.⁸ Our rolls of King John's court are more comprehensive and, despite occasional gaps and deficiencies, form a fairly continuous series. Soon after they began, the Countess died⁹; but the litigation of her heirs and of the heirs of her two husbands continued, for a while, the story of her lands.

It is clear from the rolls that she held much land in Norfolk and Suffolk, the respective counties with which her two husbands, Hugh and Roger, were principally concerned. This leads one

¹ The following abbreviations are used: B.N.B. (*Bracton's Note Book*, ed. Maitland); C.R.R. (*Curia Regis Rolls*, published by H.M. Stationery Office); P.R.S. (*Publications of the Pipe Roll Society*); Plac.Abr. (*Abbreviatio Placitorum*); R.C.R. (*Rotuli Curiae Regis*, ed. Palgrave).

² By Gundred, daughter of William de Warrenne, Earl of Surrey: *Complete Peerage*, Vol. 9 (ed. 1936), 585. Contrast Glanville-Richards, *Records of the Anglo-Norman House of Glanville*, 151, where a pedigree is quoted which identifies her with this latter Gundred; also Burke, *Extinct Peerages*, 3rd ed., 60, which leaves her parentage blank.

³ Glanville-Richards, *op. cit.* 72, 178, describes Gundred the daughter of William, Earl of Surrey, who was semble our Gundred's mother (see previous note), as 'granddaughter of William the Conqueror'. It would seem that Gundred the mother married, as her third husband, William de Glanvill (an elder brother of the Justiciar) and that their only daughter, Agnes, was his and Roger de Glanvill's heir: *ibid.* 56, 178.

⁴ Burke, *op. cit.* 60; *Complete Peerage*, Vol. 9, 585.

⁵ *Ibid.* 586; Glanville-Richards, *op. cit.* 26, 58.

⁶ See R.C.R. Vol 1; P.R.S. Vols 14, 17, 24; C.R.R. Vols. 1, 7.

⁷ 24 P.R.S. 232. See also her fine in 17 P.R.S. No. 187.

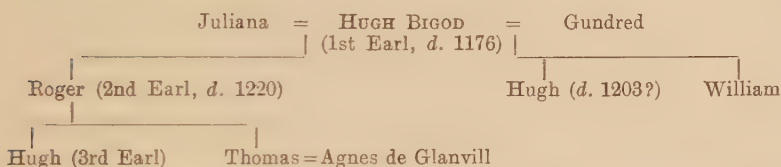
⁸ See *post*, p. 96.

⁹ *Complete Peerage*, Vol. 9, 58, gives her death as between 1200 and 1208. But it seems that she is already dead in 1206, if not before: see 20 P.R.S.N.S. 32 (Pipe Roll of 1206). She does not appear in the Pipe Rolls after 1199.

naturally to suspect that much of it had belonged to them, she holding it in widowhood as her dower. As to her *dower*, it would be the duty of her late husband's heir to see that she got it and to warrant her title to it whilst she lived. Besides her dower, however, she may well have held lands of her own which had come to her by inheritance or (more probably ¹⁰) as her *acquisitions* by purchase. Here her vendor or lord would be her warrantor during her lifetime, and her heir would inherit at her death. Lastly, there was her *maritagium*, comprising those lands which her father (or other relative) had given to her and her husband at her marriage. Here the donor, and his heirs after him, would be warrantor of her (and her husband's) title; and at her death her heir (if any), by that particular husband, would be entitled to the land and warranty.^{10a}

This essay is an attempt to analyse the litigation, in Curia Regis, concerned with Gundred's lands. The deficiencies of the available court rolls can be supplied, in part, from other contemporary documents, such as the Pipe Rolls and the Feet of Fines.¹¹

I. GUNDRED AND THE BIGODS ¹²



Gundred's first husband, Hugh Bigod (or Bigot), was an unruly earl who had obtained his earldom as a reward for helping to raise King Stephen to the throne.¹³ His first wife was Juliana, sister of Albric de Vere, Earl of Oxford.¹⁴ She bore him a son, Roger, who ultimately inherited his lands and earldom.¹⁵ Earl

¹⁰ If her father was indeed Roger, Earl of Warwick, his son Waleran and his descendants (Glanville-Richards, *op. cit.* 72) would exclude her from any paternal inheritance.

^{10a} For the law of warranty in the twelfth and thirteenth centuries, see *Cambridge Law Journal*, Vol. 8, 274 *et seq.*; *ibid.* Vol. 9, 82-106, 192-209.

¹¹ These are printed in P.R.S. Some of the relevant fines are indexed in Walter Rye's *Calendar of Fines for Suffolk*, and others are summarised in his *Pedes Finium for the County of Norfolk*. Hunter's *Fines* are irrelevant, since they do not comprise these two counties.

¹² The table with which this section begins summarises the relevant Bigod pedigree as I see it. The name Bigod (or Bigot) was originally, perhaps, a nickname derived from the oath which was commonly used by the early Normans. See *Dictionary of National Biography*, s.t. 'Hugh Bigod, 1st Earl of Norfolk'.

¹³ *Ibid.*; Burke, *Extinct Peerages*, 3rd ed., 59.

¹⁴ *Ibid.* 60; D.N.B., s.t. 'Hugh Bigod, 1st Earl of Norfolk'.

¹⁵ See previous footnote. Earl Roger was one of the King's Justices before whom fines were levied in King Richard's reign: see P.R.S., Vols. 17, 20, 23, *passim*.

Hugh died in or about the year 1176.¹⁶ Presumably his first marriage had been annulled; for this 'Countess Juliana' is listed, nine years after his death, among those widows who are in the King's gift.¹⁷ Gundred, his second wife, bore him two sons, Hugh and William.¹⁸ We take warning that Gundred's heir (Hugh or William) is not Earl Hugh's heir (Roger).

Soon after Earl Hugh died, Gundred and Roger (his heir) came to the court at Windsor, contending for his inheritance. Gundred, it appears, was particularly persuasive ('*obtulit multa et magna*') in the arguments which she addressed to the King. She was seeking for her son Hugh the late Earl's '*emptiones et perquisitiones*', and she alleged that the Earl had granted or devised these to him—the word is either *divisit* or *demisit*. King Henry, having deferred the matter, ostensibly in order that he might take counsel of his Earls and Barons, at once seized the late Earl's assets (*thesauros*) into his own hand¹⁹; and it seems that Roger was neither recognised as Earl nor allowed possession of the whole inheritance until King Richard's accession, some twelve years later.²⁰ It is interesting to observe that Gundred's contention, in 1177, was founded upon sound law. Both the so-called *Leges Henrici* (circ. 1118)²¹ and Glanvill's Treatise (circ. 1188)²² allowed one who held both inherited lands and purchased lands to give the latter (though not the former) to whomsoever he wished, to the disherison of his heir. It seems clear that her claim extended only to Earl Hugh's *acquisitions* (i.e., properties he had acquired otherwise than by inheritance) and consequently did not imply any denial that Roger was his legitimate heir.²³ On the other hand, it seems equally clear that this claim to the late Earl's '*acquisitions*'

¹⁶ D.N.B., *supra*; *Complete Peerage*, Vol. 9, 585.

¹⁷ *Rotuli de Dominabus*, 35 P.R.S. 71. She was then a widow because meanwhile she had taken a second husband, Walchelin Maminot, who had since died: *Complete Peerage*, Vol. 9, 585 (contrast J. H. Round's erroneous footnote to 35 P.R.S. 71). He was a Kentish man: his heirs' heir has his lands in 1199 (10 P.R.S. 61; 21 P.R.S.N.S. 21); with the Bishop of Ely he had witnessed a charter of the Empress Maud in 1141 (10 P.R.S. 41).

¹⁸ Burke, *Extinct Peerages*, 3rd ed., 60. Glanville-Richards, *Anglo-Norman House of Glanville*, 151, adopts an erroneous pedigree which makes Hugh the son of Juliana.

¹⁹ *Gesta Henrici II*, Vol. 1, 143–144.

²⁰ In the Pipe Rolls of 34 Hen. 2, Roger Bigod is not 'Earl' (38 P.R.S. 53) and the sheriff still has in custody lands of Earl Hugh (*ibid.* 65; see also *Great Roll of the Pipe*, 1 Ric. 1, p. 54). But in 1190 'Earl Roger le Bigot' pays 1,000 marks to the King for having his county of Norfolk: 1 P.R.S.N.S. 101. Roger was 'taken into favour' when Richard came to the throne: D.N.B., *s.t.* 'Roger Bigod, 2nd Earl of Norfolk'; and see footnote 15, *ante*.

²¹ Cap. 70 ('*emptiones vel acquisitiones*'). See also 1 Pollock and Maitland, 77; Beame's *Glanville*, 118 n.

²² Bk. 7, c. 1 ('*quaestus*'); 2 P. & M. 306.

²³ Contrast *Complete Peerage*, Vol. 9, 586 n., which suggests that Gundred's claim was founded on the annulment of Earl Hugh's first marriage.

included his earldom: first, because he had acquired it otherwise than by inheritance (for he was *first* Earl); secondly because, when at length Gundred's son Hugh formally relinquished, in the year 1199, all claim to the late Earl's lands, his quitclaim expressly included the 'third penny' of the county of Norfolk²⁴—which only an Earl could have.²⁵

Hugh's quitclaim is contained in an agreement, entered upon the court rolls, which recites that he was suing Roger (*petentem versus eum*) for this third penny and for lands situate in twelve named villis or manors—seven of which lay in Norfolk and three in Suffolk. It witnesses that Hugh has quitclaimed all his right therein and that Roger, in return, has promised him thirty librates of land in fee, to be held of Roger by homage and by the service of two knights.²⁶ The King had released the three Suffolk manors to Earl Roger (for a payment of 700 marks) in 1196, only three years before²⁷; and Hugh, it seems, had straightway sued him for them; but that action had failed owing to Roger's departure beyond the seas on the King's service.²⁸ As for the Norfolk lands, it seems that Roger (on paying 1,000 marks) had acquired from King Richard seisin of these, together with his earldom, in the year 1190.²⁹

Whether Hugh's adverse claim (which Gundred had initiated for him) was the sole justification or excuse upon which King Henry had detained these lands and the earldom for so many years is not easy to tell.³⁰ We do know, however, that, whilst Roger was still awaiting his inheritance, the author of the book called *Glanvill* was writing as follows: On the death of a baron who held of him *in capite*, the King, although the heir be already of age, forthwith retains the barony in his hand until the heir has paid or given security for the King's 'relief' (the King, unlike other lords, may fix what sum he chooses³¹). Moreover, if it be uncertain who is rightful heir, the lord of a fee is always entitled to

²⁴ 1 C.R.R. 93; Plac.Abr. 61. s.c. (wrongly dated Mich. 10 Joh.).

²⁵ *Complete Peerage*, Vol. 9, 586 n. See also 7 C.R.R. 110–111, where the Earldom of Essex is bound up with the 'third penny'.

²⁶ See footnote 24. *supra*.

²⁷ 7 P.R.S.N.S. 138. These Suffolk lands are at Staverton, Hollesley, and Hemmiegewrth (=Dunningworth).

²⁸ 21 P.R.S.N.S. (Originalia Roll) 86.

²⁹ 1 P.R.S.N.S. 101.

³⁰ Cf. footnote 20, *ante*. Conceivable alternatives might be that Roger is an infant and so (with his lands) is in the wardship of his lord the King; or that various debts and fines (e.g., 'for his war' against the King) which Earl Hugh owed the exchequer are still unpaid (Roger *Glanvill*'s lands were taken in to the King's hand for this reason—*post*, p. 97); or that Roger could not find the money for the 'relief' which the King saw fit to impose—see *Glanvill*, Bk. 9, c. 4.

³¹ *Ibid*

retain it until the matter becomes clear; 'and this the lord King is wont to do concerning all barons holding of him in chief'.³² It thus seems highly probable that Roger was so long delayed because his rights to the full inheritance were not yet clearly established to King Henry's satisfaction. And when at last he gets from King Richard the outstanding lands and earldom, each of the heavy fines that he pays to the King's exchequer is recorded as a payment not only for having them but also lest Hugh be permitted to disseise him except by judgment of the King's court.³³

That Earl Roger's title to his late father's lands was not finally settled until the latter had been dead more than twenty years, must certainly have affected his ability (if not his inclination) to perform his duties, as heir of his father, to provide and warrant his step-mother's dower. From what we have seen, it seems likely that the above delays affected only the late Earl's *acquisitions*. However this may be, we can safely assume, I think, that some at least of Gundred's dower (perhaps from his *inherited* lands) was duly found for her before our court rolls begin. In 1194, for instance, when one Yvo claimed certain land from her, by mortdancestor, Earl Roger ultimately came to her aid as co-defendant.³⁴ And in 1196, when Gundred has sued *darrein presentment* against one William, the final concord between the parties acknowledges that the church 'pertains to her free dower' and that, after she is dead, it will pass to Earl Roger and his heirs.³⁵ The subject-matter of each of these two actions was evidently dower which Roger had already assigned to her, possibly soon after 1176 when his father died.³⁶ In 1199, however, we find Earl Roger assigning further dower to her—the vill of Little Bradley in Suffolk; and thereupon she acknowledges that she is now completely satisfied (*pacata*), 'so that she cannot exact more against him concerning her dower'.³⁷ This concord, be it noted, is recorded in the rolls of the King's court, and follows immediately after Hugh's quitclaim,

³² Glanv., Bk. 9, c. 6. See Holdsworth, *History of English Law*. Vol. 3, 57–61, as to relief and primer seisin.

³³ 1 P.R.S.N.S. 101; 7 P.R.S.N.S. 138; 21 P.R.S.N.S. 86. The first of these entries adds the words 'made by his peers'.

³⁴ See 5 P.R.S.N.S. 66, where Yvo owes the King 20s. for having the writ against Gundred. The ultimate fine, in 1198, gives Earl Roger as co-defendant: Rye, *Norfolk Fines*, p. 52. Lopham, in which the land lay, is not listed among the villis comprised in Hugh's quitclaim (*supra*).

³⁵ 17 P.R.S., No. 187; Rye, *Norfolk Fines*, p. 10, *s.c.* The vill (Stratton) is not among those listed in Hugh's quitclaim (*supra*). That Gundred's action was founded on the last presentation may imply that she has held this dower for a considerable time.

³⁶ See preceding footnote. If Roger was then under age, the King as his lord and guardian would have assigned the dower on Roger's behalf: see Glanv., Bk. 6, c. 17.

³⁷ 1 C.R.R. 93.

already described.³⁸ It would therefore appear that this final instalment (more than twenty years overdue) of Gundred's dower was late because Roger, her warrantor, had only now secured his full inheritance against the claims of Hugh her son.

We now leave Earl Roger and his responsibilities, as heir of Earl Hugh his father, for his stepmother's dower. Our next problem is Gundred's *maritagium*, which was no concern of his: for when a bride's relatives granted land as *maritagium* to her and her husband (or ostensibly to him alone) the inheritance would pass, at her death, to the heir of her own body begotten of that marriage.³⁹ Consequently, if Gundred had brought *maritagium* with her to Earl Hugh, her own sons Hugh and William were possible inheritors, but Earl Roger was not.

That she had a *maritagium* settlement is clear. She founded a nunnery at Bungay (Suffolk), perhaps as early as the year 1160⁴⁰; and we have the charter of King Henry II which subsequently confirmed to the nunnery the gifts with which she had endowed it.⁴¹ These gifts include five churches, with their appurtenances, at Bungay, Metingham and Ilketelshale; and each of these five churches—so runs the King's charter—is situate 'in the free *maritagium* of the said Countess Gundreda'. The King's confirming charter is obviously later than the year 1176 (when Earl Hugh died); for it recites that it is made 'at the petition of Roger de Glanvill and of Countess Gundreda his wife'. Moreover, one of the gifts which it expressly confirms is a rent of ten shillings 'from the mills of the same Roger and Countess Gundreda in the vill of Bungay'. This hints at co-ownership, and so might be thought to imply that the *maritagium* came to Gundred on the occasion of her marriage to Roger Glanvill. But one must not forget that, until very recently, the legal effect of a marriage or re-marriage was to put the wife and her property into the power of her husband. That Gundred's second husband acted with her in obtaining the King's confirmation of her previous gifts is therefore

³⁸ A short uninformative entry intervenes, *de placito poncium et calcearum* between Roger and Gundred: 1 C.R.R. 93. They are given a day to hear their judgment (concerning this plea, perhaps) nearly two years later: 1 C.R.R. 905.

³⁹ As to *maritagium*, see 9 *Cambridge Law Journal*, 92-96, 197.

⁴⁰ See Dugdale, *Monasticon Anglicanum*, iv, 337. *The Complete Peerage*, Vol. 9, 586, suggests the year 1188, which is more likely the date of the King's charter of confirmation. That her first gifts to the nunnery came out of her *maritagium* may imply that Earl Hugh (died 1176) was dead and that she had not yet remarried. An Earl Hugh Bigod was one of its benefactors; but his gift is confirmed by a charter of King Henry III (Henry II's charter does not mention it); so he was evidently the third Earl (Earl Roger's son): contrast Glanville-Richards, *Anglo-Norman House of Glanville*, 58, which assumes him to be the first Earl Hugh.

⁴¹ Dugdale, *op. cit.* 338-339.

no ground for assuming that they had ever in any sense belonged to him.⁴² There are other contemporary records, moreover, which show that the Bungay lands were associated with her Bigod marriage.⁴³ It thus appears that her 'free *maritagium*', described in King Henry's charter, came to her at her first marriage, and that, although the mills at Bungay are said to belong to Roger (her second husband) as well as to her, this implies nothing more than that she is now his wife.⁴⁴ There is one other problem here. How could she validly give away her *maritagium*, in this fashion, so as to defeat her expectant heirs? No doubt these gifts of hers, like other gifts she made,⁴⁵ were evidenced by charters in which, expressly or by implication, she had bound herself and her heirs to warranty. This in itself would sufficiently bind and bar her heir.⁴⁶ And, lest there be any doubt about the force of this device (whether as against the heirs of her first marriage or as against her second husband), there is the force, such as it is, of King Henry's 'grant and confirmation'.

Whether Gundred's *maritagium* comprised any other lands, besides those mentioned in the Bungay charter, we do not know. She certainly held other lands in fee. But whether she so held them in *maritagium* or in fee simple is hard to tell; for in either case the only clue we are likely to get is that one or other of her Bigod sons inherited such lands at her death. It is unlikely that she herself had inherited any land.⁴⁷ But she may well have

⁴² Contrast Dugdale, *op. cit.* 337, who gives the foundation date as 1160 (when she was in fact married to Earl Hugh and yet deduces from the form of King Henry's charter that Roger Glanvill and Gundred were co-founders. He then weakens (in view of an authority to the contrary) on the ground that King Henry's charter shows that most of the endowment was Gundred's *dower* (*sic*) at her marriage. Glanville-Richards, *op. cit.* 58, similarly speaks of Roger and Gundred as 'the founders', and yet lists Earl Hugh (her previous husband) among the nunnery's benefactors: cf. footnote 40, *supra*.

⁴³ In 1199, Hugh Bigod (Gundred's son) owes the King 40 marks (which he seems never to pay) for extending by two days his fair at Bungay: *Rotuli de Oblatis et Finibus*, 70; 12 P.R.S.N.S. 147. In 1206, Earl Roger Bigod alleges that Gundred had held the land of Bungay *of his inheritance* (*i.e.*, in dower from Earl Hugh—this allegation must be false) and pays the King 100 marks lest he be disseised of it without a judgment of the King's court: 20 P.R.S.N.S. 32.

⁴⁴ In the year 1200, some years after Roger Glanvill's death, Gundred was sued by a neighbouring landowner for nuisance, in raising the mill pool at Bungay. She pleaded, *inter alia*, that the sheriff (by the view of lawful knights) had caused her by order of the King's Justices to have the ancient site [*veterem sedem*] of the mill. The sheriff came to court and warranted this. 1 C.R.R. 305; *Plac.Abr.* 28, *s.c.*

⁴⁵ See 5 C.R.R. 272 (1208), where the Prioress of Bungay sues *de warrantia cartae* against Gundred's heir in respect of other lands she had given to the convent. Apparently the Prioress won, for these lands are included in a subsequent charter of confirmation made to the convent by King Henry III: Dugdale, *Monasticon Anglicanum*, IV, 338-339. See further, p. 92, *post*.

⁴⁶ See 9 *Cambridge Law Journal*, 87-105, 198-201; also preceding footnote.

⁴⁷ See footnote 10, *ante*.

acquired some by her own purchase. Even in those early days, however, a married woman could not during coverture have chattels of her own and so, it seems, could not effectively buy land for herself in the lifetime of her husband. Gundred herself provides authority for this very proposition. While married to Earl Hugh, she had bought (for sixty marks) a half knight's-fee in Norfolk and had taken the precaution of transacting the matter in the King's court. In 1196, however, her stepson Earl Roger sued her for this land, claiming it as heir of Earl Hugh (his father).⁴⁸ Gundred's defence was that she had bought the land herself; and she produced a chirograph made in the King's court to that effect. Earl Roger answered that whilst her husband lived she could not have had any money or other chattels of her own and so could not have made a purchase which would stand valid for herself. This argument prevailed and seisin was adjudged to Roger. The recorded *ratio decidendi* is 'she could have no chattels for herself in the time of her husband which were not her husband's'. But the judgment ends with a somewhat obscure hint from the court that she has, nevertheless, a right of action 'upon the agreement' against Earl Hugh's heir (this very Roger): and this, perhaps, implies that Earl Hugh was a party to her chirograph and had covenanted therein, for himself and his heirs, to honour the deal.

Other land which she probably had purchased in her own right was situate at Waineford (or Wangford) in Suffolk. We first hear of it in the Fine Rolls of the year 1197.⁴⁹ Gundred had obtained this land by a grant from one William Brom; but he is now dead, and she is suing Roger Brom, his son and heir, to warrant William's charter to her and her heirs. This he does; and he takes her fealty and the homage of her son Hugh Bigod. We pause to observe that Hugh, in 1197, seems to be Gundred's heir apparent. In her statement of claim, she had described this land as 'the whole land of Waineford which Earl Hugh cultivated with his ploughs'. This looks very like an allegation of seisin such as may perfect a grant. And it seems to hint that this land, too, Gundred had acquired whilst she was covert.⁵⁰ Our next record of this particular land is from the Easter Term of 1208: and now Gundred's second

⁴⁸ 24 P.R.S. 232; Plac.Abr. 96, *s.c.* The land is in 'Langhale'.

⁴⁹ 23 P.R.S., No. 52.

⁵⁰ It cannot be, I think, that this was part of her *maritagium* and William Brom the settlor; for King Henry's charter about her other *maritagium* (*supra*) had described it as 'free', which implied, *inter alia*, that no homage would be taken until the third heir: see 9 *Cambridge Law Journal*, 93-96. Presumably, the defendant was persuaded to take the homage (in advance) of Gundred's heir apparent in order to bar him from subsequently questioning the latter's title: see *ibid.* 88-90.

son, William Bigod, is claiming it against the same defendant.⁵¹ The action ends abruptly with William's acknowledgment that the defendant has now duly given him seisin. This seems to mean (i) that both Gundred and Hugh, her elder son who formerly did homage for this very land, are dead; (ii) that Hugh died without issue; and (iii) that William, her younger son, is now the heir of both of them. William was not allowed to enjoy his seisin of this land for many months. In the following term of the same year,⁵² the Prioress of Bungay summons him to warrant a charter of gift which—so she says—the Countess had made of this and other Suffolk lands. William, as we have seen, is evidently now his mother's heir and so must honour her gifts and warranties if the gifts are valid in law. He contends, however, that this gift was invalid, on the ground that the Prioress never obtained seisin thereof in his mother's lifetime. This point is left to a jury, whose verdict we are not told. But it seems probable that they found in favour of the Prioress; for when, in the year 1235, the third King Henry 'granted and confirmed' to the nunnery a long list of endowments additional to those which his royal grandfather had confirmed before him, these same lands ('*de dono* Countess Gundred') are included.⁵³ This litigation clearly shows that William Bigod ultimately became Gundred's heir, when her other (and presumably elder) son Hugh was dead. It also hints that in fact Hugh had predeceased her, and so had never become her heir⁵⁴; otherwise she would hardly have given away the Waineford land, after persuading the lord to take his homage.⁵⁵

Evidently Gundred was dead before Easter, 1208. Can we date the death of her son Hugh? He is not named in the Pipe Rolls after the year 1202, and this although he seems never to have paid a certain debt due to the King which the rolls of that year and of the three years preceding have steadily recorded against him.⁵⁶

⁵¹ 5 C.R.R. 207. Doubtless the defendant, as lord of the fee, had seized the land on Gundred's death, pending the appearance of her lawful heir; see footnote 54, *post*.

⁵² 5 C.R.R. 272.

⁵³ Dugdale, *Monasticon Anglicanum*, IV, 337–339. These lands are 'all her land of Weston and of Weynesford and 24 acres in Cove'. She had also given them the site of a windmill at Northales. Other endowments at Waineford include Earl Roger Bigod's mill there, and William Bardulf's meadow adjoining.

⁵⁴ Another indication that Hugh predeceased her is William's allegation against the Prioress (5 C.R.R. 272) that his previous action for that land (5 C.R.R. 207) was 'an assize concerning the death and seisin of his mother'. This the Prioress did not deny.

⁵⁵ Such homage 'in advance', however, would probably not divest her fee: see 9 *Cambridge Law Journal*, 90, note 18.

⁵⁶ *Rotuli de Oblatis et Finibus*, p. 70; 12 P.R.S.N.S. 147; 14 P.R.S.N.S. 138; 15 P.R.S.N.S. 111. The debt was 40 marks for extending his fair at Bungay. There is no mention of this Hugh in Bracton's Note Book.

Nor, with one disturbing exception, have I found him in any rolls of the King's court subsequent to that year. This exception is to be found in a roll entitled 'Pleas and Assizes at Norwich in the 10th year of King John', printed in *Abbreviatio Placitorum*.⁵⁷ An assize has come to recognise whether 'William le Ribot (*sic*) and Hugh fitz Gundredi (*sic*) and Geoffrey Pratt' have unjustly disseised one Robert Gildenfot of his free tenement in Sidhing, to wit, of a certain toll of herrings and salt (*allec' et salis*), which toll the Countess Gundred had given him for his service. The jury answer that William, Hugh and Geoffrey did so disseise him, and they proceed to specify the nature of this curious 'tenement': it concerns carts passing along a certain road, and the plaintiff is thereby entitled to five herrings (*quinque allecam*) from each cart. It is obvious, I think, that the two first named of these disseisors were Gundred's two sons, William and Hugh. Does this necessarily imply that Hugh was alive in the tenth year of King John (1208), when this assize is said to have occurred? If so, our previous assumption that he died before Gundred, his mother, and perhaps as early as the year 1203 is in jeopardy.

Despite the reputed date of this assize, we may suspect that Hugh was then already dead, and for the following reasons. (1) At this period, one could sue novel disseisin, so long as the alleged disseisin had occurred after the Michaelmas next preceding King John's coronation.⁵⁸ Hence, even assuming that our assize was held in the year 1208, the disseisin itself may well have occurred at any time after Michaelmas, 1198. (2) According to Maitland, the assize of novel disseisin did not lie unless the disseisor was still living.⁵⁹ But the case (dated 1229) which he cites from Bracton's Note Book, as authority for this proposition, does not say this in so many words.⁶⁰ Indeed, the annotation which Bracton (as is thought) wrote beside it says something significantly different, which is material to our particular problem: 'Note that an assize of novel disseisin fails where the *principal* disseisor among many has died'. So, unless our Hugh was the principal disseisor

⁵⁷ Plac. Abr. 64. I have not found any further contemporary records of this plaintiff or his curious 'free tenement'. But one Rannulf de Sid'ing was among the witnesses to one of Gundred's charters of gift to Bungay Nunnery: 5 C.R.R. 272.

⁵⁸ See 5 C.R.R. 309-310 (1208). It had been the same in 1199: see 1 R.C.R. 448. This fills a gap left by 2 Pollock and Maitland, p. 51; King John was crowned in May, 1199: 1 R.C.R. lxxxiii.

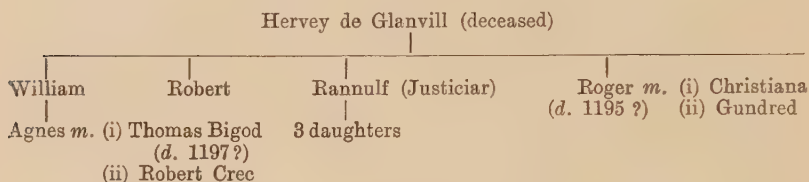
⁵⁹ 2 P. & M. 55, 64.

⁶⁰ B.N.B., No. 336: 'The assize has come to recognise whether Stephen Archbishop of Canterbury and others unjustly, etc., disseised Hugh . . . And the Archbishop has died . . . And Hugh acknowledges this. Therefore it is adjudged that all be without day thereof. And let Hugh proceed, if he wish, against the Archbishop who now is'. This final sentence of the judgment alludes, no doubt, to a possible writ of entry or writ of right.

(and we observe that he is not the first named of the three), the fact that this assize was held does not necessarily imply that he was still alive.⁶¹ (3) The regnal years assigned to cases in *Abbreviatio Placitorum* are unreliable and are often demonstrably wrong: it attributes to 10 John (1208), for instance, yet another action in which our Hugh was a party, whereas that action in fact comes from 10 Richard (1199).⁶²

So much for our attempt to date Hugh Bigod's death. Whatever that date should be, there is no room to doubt that William, his (younger?) brother, lived to be his and Gundred's heir.⁶³

2. GUNDRED AND THE GLANVILLS⁶⁴



It seems that Sir Hervey de Glanvill, Chamberlain to King Stephen, was born in the reign of William Rufus and was the father of many children.⁶⁵ Among these children were William (apparently his eldest son), Rannulf the Justiciar, Robert (of whom we know little) and Roger who became Gundred's second husband. This Roger, who is our chief concern, had lands in Suffolk. The records of the year 1166 show that he then held, besides, four knights' fees in Essex in right of his wife,⁶⁶—i.e., his first wife, Christiana, who then was evidently still alive.⁶⁷ In that

⁶¹ The assize would have failed, I think, had Hugh (being dead) been named in the original writ. See 1 C.R.R. 196 (1200); also 4 C.R.R. 286 (1206); in each of which an assize (probably moridancester) failed because one of several co-defendants 'of whom the writ speaks' (or 'who was put in the writ') has died.

⁶² Plac.Abr. 61; cf. 1 C.R.R. 93. Many like errors might be cited: e.g., Dionisia de Biousfeld's action for her *maritagium* in Kent is wrongly assigned (Plac.Abr. 65) to 11 John, but was in fact 2 John (see 1 C.R.R. 254).

⁶³ In the year 1206, this William and Earl Roger (his stepbrother) compromise an action and a chirograph is to be made thereof: 4 C.R.R. 229. Some years later, they litigate about the advowson of the church in Esse (Suffolk) and Earl Roger admits that he gave William the vill of Clakestorp, by charter, but denies that the church is situate therein: Plac.Abr. 91 (1213); also Rye, *Calendar of Suffolk Fines*, p. 21. Perhaps, on Hugh's death without issue, William replaced him as Earl Roger's tenant of some of the 30 librates of land (*ante*, p. 87). William married Margaret, daughter of Robert de Sutton, who provided them with *maritagium* in Essex: 6 C.R.R. 78, 146; B.N.B., Nos. 89, 1279; Rye, *Norfolk Fines*, p. 136.

⁶⁴ The table with which this section begins summarises the relevant Glanvill pedigree as I see it; but perhaps Robert was third or youngest son.

⁶⁵ Glanville-Richards, *Anglo-Norman House of Glanville*, 22, 26.

⁶⁶ *Red Book of the Exchequer*, p. 349.

⁶⁷ There is no evidence that Christiana bore him any children: his tenure of this land would therefore cease at her death. See Glanville-Richards, *op. cit.* 40, for

same year, moreover, he held also one knight's fee in Norfolk (probably at Roughton⁶⁸), by the feoffment of Earl Hugh Bigod⁶⁹; which hints, perhaps, that Roger and Gundred were then already acquainted. The Pipe Rolls show him as *custos* of the New Castle *super Tinam* for the period 1175 to 1189, with £30 a year during the King's pleasure,⁷⁰ and as sheriff of Northumberland for the years 1185 to 1189.⁷¹ But in 1190 he is *custos* and sheriff no longer: instead, the exchequer rolls record that he owes 400 marks 'for his fine and lest an *inquisitio* be made upon him'. Of this debt he pays 300 marks immediately⁷²; but he never discharges the balance, and ultimately it falls upon his heir after his death.⁷³ Why he owed the King this heavy fine and what kind of inquest he feared are hard to say.⁷⁴ Presumably one who had served as sheriff ran risks, hardly to be avoided, in the course of his official duties; and, in those days, sheriffs and even perhaps wardens of castles were prone to be charged with grave misconduct. Yet it is difficult to believe that our Roger was in any serious trouble.⁷⁵ In November, 1189, he is among the witnesses to one of the King's charters at Westminster,⁷⁶ and then we read of him as a crusader who earns approval at the walls of Acre (1190) and at the gates

a charter whereby Roger gave a church to Leiston Abbey (founded by Rannulf his brother) 'for the health of my soul and the souls of Countess Gundred my wife and of . . . my wife Christiana'.

⁶⁸ See *post*, footnote 107.

⁶⁹ *Red Book of the Exchequer*, pp. 395-397.

⁷⁰ These entries continue each year from 25 P.R.S. 137 to the Great Roll of the Pipe for 1 Ric. 1, p. 240, inclusive. See also *Red Book of the Exchequer*, p. 796.

⁷¹ This entry begins with 36 P.R.S. 123, and continues to the Great Roll of the Pipe for 1 Ric. 1, p. 240.

⁷² 1 P.R.S.N.S. 101.

⁷³ In each succeeding year until 1197 the rolls record that he 'owes' this 100 marks. Then follow three years (1197-1199) in which the entry appears with a blank space where the word '*debet*' should be—a hint, perhaps, that Roger is dead. In the last of these three, the scribe has added 'but Robert de Crec answers thereof below'; and a subsequent entry tells that this Robert (who, as we shall see, has married Agnes, Roger's niece and heir) owes only 50 marks on Roger's behalf, because King Richard has pardoned him the other 50: 10 P.R.S.N.S. 265, 290; *Rotuli de Oblatis et Finibus*, p. 12. Robert pays it off in annual driblets until, in 1203, all is paid: 16 P.R.S.N.S. 240.

⁷⁴ In the Pipe Rolls of 1195, one Robert Pesehal owes 1 mark in order to have a certain message in Northumberland *si possit inquiri* what Roger Glanvill gave him: 6 P.R.S.N.S. 25. In 1196 this same Robert is sued by Roger Glanvill's heir, Agnes (as yet the wife of Thomas Bigod) for two mills and certain lands in and around the vill of New Castle: they concord by a fine which recognises that Robert's title is sound: 20 P.R.S., No. 1.

⁷⁵ Perhaps Roger's fine relates to monies he had collected as the King's official, or was a payment for the privilege of having held lucrative office. Cf. 10 P.R.S. N.S. 264 and 21 P.R.S.N.S. 77, where one William Glanvill owes in respect of his or his late father's *custodia* (of Oreford Castle?) 35 marks, which in one entry is described as *de fino suo*; he also owes for his father's 'old farm' of the county, *ibid.* This William was the son of Roger Glanvill's first cousin Bartholomew: see Glanville-Richards, *op. cit.* 12, 176-177.

⁷⁶ *Itinerary of Richard I*, 13 P.R.S.N.S. 14.

of Jerusalem (1192).⁷⁷ The date of his marriage to Countess Gundred is uncertain. So, to some extent, is the date of his death. He is not alive in 1198; for in that year Gundred owes the King £100 for a promise that she shall not be married again against her will.⁷⁸ And her actions for dower from his lands prove that he died at least as early as the year 1195.⁷⁹ He left no legitimate issue.

When Roger Glanvill is dead, the Countess Gundred begins her actions for her 'reasonable dower which falls to her *ex dono* Roger de Glanvill formerly her husband'. First she thus sues one Thomas Bigod, in the year 1196.⁸⁰ Then, three years later, she brings a precisely similar action against Robert de Crec.⁸¹ The mysterious feature of these two actions is that in each of them she is claiming dower from lands situate in the same three vills,⁸² and that in each of them her action is expressed to be for dower '*unde nichil habet, ut dicit*'. At first sight, therefore, she seems inexplicably to be claiming the same dower from two different defendants. Then we discover that the first defendant, Thomas, and Agnes his wife had together appointed an attorney for the purposes of the former action,⁸³ and that, in the course of the second action, the defendant Robert 'vouches to warranty Agnes, Robert's wife, whose inheritance that land is'.⁸⁴ This Agnes, it thus appears, is Roger Glanvill's heir. Then, in a quite different action, tried in the year 1200, we find a defendant asserting that Agnes, the wife of Robert de Crec, is the daughter and heir of William de Glanvill (Roger's brother).⁸⁵ It thus transpires that this Agnes, the niece and heir of our Roger Glanvill, was twice married: first to Thomas Bigod and then to Robert Crec.⁸⁶ This solves our mystery. Each

⁷⁷ *Ibid.*, 16; Glanville-Richards, *op. cit.* 54.

⁷⁸ 9 P.R.S.N.S. 94. She pays 100 marks at once, and the balance the following year: 10 P.R.S.N.S. 274.

⁷⁹ *E.g.*, 7 C.R.R. 331, where she is suing for her dower in the Hilary Term of 1196. See also footnotes, 73, 74, *ante*.

⁸⁰ 7 C.R.R. 331 (Hil. 1196).

⁸¹ 1 C.R.R. 83 (Hil. 1199); 1 R.C.R. 229; 2 R.C.R. 135 (Nov. 1199); 1 C.R.R. 326 (Mich. 1200).

⁸² They are Middleton and Jokeford (Yoxford?) in Suffolk, and Ruhton or Rushiton (Roughton?) in Norfolk.

⁸³ 24 P.R.S. 224 (Hil. 1196).

⁸⁴ 1 C.R.R. 83.

⁸⁵ 1 C.R.R. 155 (Hil. 1200): a writ of right, moved by *pone* from the shire court, against Geoffrey de Lodnes for land in Rattlesden (Suffolk). His defence is that he got it with his wife Alice, daughter of Hervey de Glanvill (and so our Roger's sister) in *maritagium*, and that consequently Robert de Crec, who has the daughter of William de Glanvill, ought to be their warrantor. This clearly implies (1) that William was our Roger's *eldest* brother (or at least was the eldest of those brothers who or whose issue were still surviving), (2) that Agnes is this William's sole heir. Meanwhile, Geoffrey and wife are suing a plea of warranty against Robert de Crec as to this very land: 2 R.C.R. 100. Ultimately a final concord is reached: Rye, *Calendar of Suffolk Fines*, p. 8 (1202).

⁸⁶ Thomas Bigod, like Earl Roger Bigod, is listed among the benefactors of Bungay Nunnery: Glanville-Richards, *Anglo-Norman House of Glanville*, 58. He is

of Gundred's two actions for her dower was evidently directed against the same person—Agnes de Glanvill; but the law of those days was such that one who wished to sue a married woman for her lands must sue her husband, in whose guardianship she and her lands then lay.

Our record of Gundred's action against Thomas Bigod is sometimes indecipherable. Thomas pleads first, it seems, to her allegation *unde nihil habet*: to this he contends that in fact she already has some dower, which he specifies.⁸⁷ Then he advances a second argument, partly illegible, which seems to be that a part of the land, which she is claiming, he has lost because someone (I suspect Roger, her late husband) failed to warrant him when Radulfus (=Rannulf?) de Glanvill sued him for it. Ultimately, however, he seems to withdraw from both these arguments and submits to a concord whereby he *and his wife* are, after all, 'to render her dower in the said vills'. Whether in fact they carried out this promise, and to what extent, we do not know for certain. But one of the defences advanced by Robert de Crec, when Gundred comes to sue him for her reasonable dower from these same lands, is that 'formerly, by judgment of the court, Thomas le Bigot made to her a third part of all the said land'.⁸⁸ What Robert, as defendant, says of the past, is likely to be biased by the exigencies of the present. But, if he is to be believed, the 'reasonable dower' that Agnes and her first husband undertook to assign to Gundred, under pressure of her first bout of litigation, was only one-third of these lands; and his words are perhaps intended to imply that they actually fulfilled that undertaking.

It seems that Gundred's second action for this reasonable dower, wherein Robert de Crec is the nominal defendant, in fact comprises two separate actions. In the first of these, in Hilary 1199, Robert begins by denying that he holds the land, 'for', says he, 'it is in the hand of the lord King for 100 marks which the lord King exacts from me'.⁸⁹ We recall that the burden of Roger Glanvill's unpaid fine has fallen upon him: he seeks to shield himself behind it. Then, lest this first point fail, he vouches to warranty his wife, Agnes, 'whose inheritance that land is'; and the case is adjourned

presumably Earl Roger's son: see Burke, *Extinct Peerages*, s.t. 'Roger Bigod', whose son Thomas is mentioned but is given no wife. There is no trace of him after 1196: evidently he died and his widow remarried, before Gundred's second action of 1199. Glanville-Richards, *op. cit.* 56-57, 178, wrongly assumes that Robert de Crec was Agnes's only husband.

⁸⁷ 'The whole vill of Walton . . . and more than a third part in Ruston'.

⁸⁸ 2 R.C.R. 135. Robert is speaking here as attorney of Agnes, his wife, as well as on his own behalf: see 1 R.C.R. 229.

⁸⁹ 1 C.R.R. 83. This 100 marks is the unpaid balance of Roger de Glanvill's fine: see *ante*, p. 95.

till Easter, in order that Agnes may come to court. When next we hear of them, however, the Easter and even the Trinity term are over. It is now November, and we observe that Gundred is now framing her claim somewhat differently.⁹⁰ Instead of the final words '*unde nihil habet*', which she has invariably used in the past, we read '*quam ei deforc̄*'. This hints that she has now received some of the dower which she is claiming.⁹¹ At once Robert puts this very point. He says that Gundred formerly impleaded himself and his wife; that they then receded from court on terms that they would give her a third part of the lands; and that they have in fact done so, by the view of certain men whom he names. To this, Gundred replies that she never claimed a mere third part of these lands but (and this is news to us) the whole of them, 'just as the charter of Roger de Glanvill testifies'. Here let us pause to vouch the treatise of Glanvill the Justiciar. A widow cannot claim in dower more than a third part of her husband's various lands; but if, at the time of their betrothal, the husband named as her dower certain *specific* lands which he then had, she can have the whole of those, so long as they do not amount in value to more than a third part of all his landed property.⁹² Evidently Robert de Crec (or his attorney) was well acquainted with this rule; for his answer to Gundred's assertion that Roger had endowed her of the whole is that Roger had no other land (*sc.* at the time of their betrothal?) than these for which she is suing. This, and Robert's version of her former claim against Thomas Bigod, concludes the hearing. They are given a day to hear their judgment in the Hilary Term, 1200. But our records tell nothing of any such judgment until Michaelmas of that year. And even then, all that we find is a further adjournment (*prece parcium*) to the following Easter, in order that they may hear their judgment and the record of Gundred's original action against Thomas Bigod.⁹³ At this point our records of this litigation end. Gundred has now achieved a third part of these lands for her dower; but she is still striving for more.

Gundred's importunate litigation for her dower was not the only burden that passed with Roger Glanvill's inheritance to

⁹⁰ 2 R.C.R. 135.

⁹¹ If as yet she has no part of her dower, the widow may use the writ which says '*unde nihil habet, ut dicit*'; otherwise she must use the more dilatory writ of right of dower: Glanvill, Bk. 6, cc. 4, 5, 14, 15. The former writ says '*quod ipse injuste ei deforciat*' (*ibid.* c. 15): but the writ of right says '*quam ei deforciat*' (*ibid.* c. 5).

⁹² *Ibid.*, Bk. 6, c. 1.

⁹³ 1 C.R.R. 326. The scribe has noted that 'that record is in the 7th year' (*sc.* of King Richard). I assume therefore that the 'record of her dower', to which this entry refers, is that of her original action against Thomas Bigod.

Agnes and her husbands. We have already seen that the unpaid arrears of Roger's fine were charged against it.⁹⁴ There were also certain gifts which Roger had made in his lifetime, and which Agnes, as his heir, was therefore bound to warrant. Some of these gifts he had made in those very villis which Gundred claimed as dower: the church of Roughton to Gundred's nunnery at Bungay⁹⁵; the church of Middleton to Leiston Abbey, founded by his brother Rannulf the Justiciar.⁹⁶ And there was trouble for Agnes and her husbands in yet another Suffolk vill, the vill of Torp (Thorpe), wherein her uncle Roger had had lands and tenants. Here, with her first husband, she manages to persuade the sitting tenant of thirty acres to acknowledge that they are her inheritance; and a final concord duly records this acknowledgment and their renewal of his tenancy in fee at an annual rent of two shillings.⁹⁷ In that same vill, moreover, Roger had given to a certain priory a vineyard (?) and fishpool, together with certain water rights, it seems, over the mill pond there: at least twice the prior brought Agnes' second husband to court about these properties.⁹⁸

Agnes, as Roger Glanvill's heir, had yet another problem. One Robert de Glanvill believed that he himself, not Agnes, was heir to Roger's lands. This Robert was a brother of Roger Glanvill,⁹⁹ and of William Glanvill (Agnes' father), and he lived on long after they and Rannulf the Justiciar were dead. Upon what grounds he claimed to be Roger's heir we are not told; but everything seems to point to a famous problem of that time.^{99a} If a man dies without issue (as did Roger Glanvill), leaving (i) a surviving younger brother (Robert) and (ii) the child (Agnes) of a deceased elder brother (William), which of these two is his heir? In those days, the principle that a child represents his (or her) deceased parent, in the law of inheritance, was not yet fully established. Indeed, King John's dubious claim to inherit the throne from King Richard was against it, and was founded upon a pedigree precisely analogous to

⁹⁴ *Ante*, footnote 89.

⁹⁵ Dugdale, *Monasticon Anglicanum*, IV, 338.

⁹⁶ Roger's charter confirming this gift is printed in Glanville-Richards, *Anglo-Norman House of Glanville*, 40.

⁹⁷ For this fine, dated October, 1196, see 20 P.R.S., No. 7.

⁹⁸ In 1207, Robert de Crec has unjustly and without judgment broken the pool of the mill: he must pay damages and repair it: 5 C.R.R. 42, 70. In 1211, Agnes and Robert are sued about the vineyard and fishpool, and they quitclaim to the prior in return for 7s. *per annum*: Rye, *Norfolk Fines*, p. 136. It seems that the former action, for novel disseisin, was in the nature of an action of nuisance: see Glanvill's *Treatise*, Bk. 13, cc. 34, 36.

⁹⁹ 5 C.R.R. 202.

^{99a} 2 P. & M. 281 *et seq.* Alternatively, if we assume that the lands had been given to Roger by his father, for his homage, Robert's claim to inherit them could rest upon the rule 'cannot be lord and heir': see *Cambridge Law Journal*, Vol. 9, 96 *et seq.*

that which we have before us. If King John could override the child of his deceased elder brother (Geoffrey) and so inherit a throne, Robert Glanvill's persistent attempts to do likewise in order to inherit Roger's lands are understandable. His first move, it seems, was to promise King Richard 100s. 'for having right (*i.e.*, for having an action) concerning the inheritance which descends to him from Roger de Glanvill'. He makes this promise, somewhat prematurely, in the year 1191,¹⁰⁰ whilst Roger (as we have seen) is a crusader and very much alive. The scribes who wrote the Pipe Rolls seem to have found this amusing; and for some few years they add to the annual record of this debt (which Robert left unpaid for fifteen years) the ambiguous comment 'but he had not right'.¹⁰¹ In the year 1203, however, their comment is 'and he has had right'.¹⁰² And in that same year he is suing Agnes and her husband for two of the three villis (Yoxford and Midelton in Suffolk) which Gundred had claimed from them as her dower.¹⁰³ This action was compromised, by a fine which I have not seen.¹⁰⁴ But one can safely assume, I think, that Robert lost his case.¹⁰⁵ He had already lost, to Agnes and her first husband, Roger's lands in Roughton—the third vill comprised in Gundred's dower.¹⁰⁶ Finally, in the year 1208, this Robert Glanvill tries one last bout of litigation. He is still convinced that he is Roger's heir; and he hopefully sues two actions of mortdancestour—one for the Roughton land, the other for a carucate in Burstall. The former results in a fine, whereby he withdraws all claim to the land¹⁰⁷; and this although he had rashly promised the King one palfrey for the

¹⁰⁰ 2 P.R.S.N.S. 50.

¹⁰¹ 6 P.R.S.N.S. 68; 7 *ibid.* 129; 8 *ibid.* 229. In 19 *ibid.* 244 he pays.

¹⁰² 16 P.R.S.N.S. 237.

¹⁰³ 2 C.R.R. 213. The lands are there assessed as one knight's fee.

¹⁰⁴ It is mentioned in Rye, *Calendar of Suffolk Fines*, p. 11.

¹⁰⁵ In that year, and the next, he owed the King 1 mark for a false claim: 16 P.R.S.N.S. 99; 18 *ibid.* 99. But these entries are in the Pipe Rolls for Lincolnshire.

¹⁰⁶ Our only record of this is the resulting fine, in 1196: 17 P.R.S., No. 155; Rye, *Norfolk Fines*, p. 10. The area of this land is given as one carucate. Robert de Glanvill is described as 'tenant'. Presumably he managed to get into possession of it as soon as Roger died, and Agnes with her husband (Thomas Bigod) had sued mortdancestour against him. They console him with 5 marks.

¹⁰⁷ 5 C.R.R. 202, 292; Rye, *Norfolk Fines*, p. 138. There is some mystery here. For some reason, the defendant (one William) vouches as warrantor Earl Roger Bigod, who duly warrants him; moreover, Robert's quitclaim (in return for 40 marks) is made to the Earl, so that the defendant will retain possession as the Earl's tenant, by the *service of one knight*. This Roughton land is evidently the same land (again one carucate, as in preceding footnote) that Agnes recovered from Robert Glanvill in 1196: since then she has evidently sold or released it to Earl Roger Bigod, who thereupon enfeoffed the present tenant. It seems to be the same land (again 1 knight's fee in Norfolk) which Roger Glanvill had acquired from Earl Hugh Bigod in 1166 (*ante*, footnote 68) and which, in the years 1196–1200, Gundred had claimed from Agnes as dower (*ante*, footnote 82).

privilege of having the assize.¹⁰⁸ The Burstall action, for which he has paid the King three marks,¹⁰⁹ is even less successful: he is found to be suing one who has not the land in question; so the action fails and Robert 'remains in mercy for a false claim'.¹¹⁰ We hear no more of him.

Agnes de Glanvill and her second husband were concerned in many other lawsuits besides those outlined above. For the most part, I think, they relate to lands which had come to her from her father, and so are not our concern. There is, however, one last trail of litigation which, if we are not mistaken, reveals a family secret embarrassing both for Agnes, as Roger Glanvill's heir, and for the Countess Gundred, as his wife and widow. In short, there is some reason to suppose that Roger left a natural son, Richard.

This Richard held lands in Bedfordshire, of Roger Glanvill's gift. We never hear of him in Norfolk or in Suffolk, the counties wherein Roger's inheritance lay. Nor is there any sign that Gundred made any claim for dower from these Bedfordshire lands. A widow's reasonable dower, be it remembered, might well extend to lands which her husband had alienated in his lifetime.¹¹¹ If however, the husband with her concurrence had named *specific* lands for her dower (as Roger had done for Gundred¹¹²), she had no right to dower from any others.¹¹³ We are thus at liberty to suppose that Roger so arranged his properties—a grant to Richard in Bedfordshire and dower for Gundred restricted to Norfolk and Suffolk—as to eliminate any possibility of conflict between his widow and his natural son.

Our evidence in Bedfordshire begins, in 1193, with an indication that 'Roger de Glanvill' has lost some lawsuit.¹¹⁴ We have evidence, moreover, that he once witnessed a charter there.¹¹⁵ Then, in the year 1199, 'Richard de Glanvill' is named as a party (probably defendant) to some other action, which is 'without day' because Richard is in the King's service beyond the seas.¹¹⁶ A gap of four years intervenes. And then, in the year 1204, begins a long series of actions wherein our Richard contends with one Roger de Argentom and his wife Maud, about lands in and around

¹⁰⁸ 23 P.R.S.N.S. 13. Robert Crec takes over this obligation for him: *ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ 5 C.R.R. 205: it transpired that defendant's daughter was the actual tenant.

¹¹¹ Glanv., Bk. 6, cc. 2, 3, 13, 17.

¹¹² *Ante*, p. 98.

¹¹³ Glanv., Bk. 6, c. 3.

¹¹⁴ In the Pipe Roll of 5 Richard, a Bedfordshire entry runs: 'Walter de Stiveclea owes 100s. for his judgment which he had against Roger de Glanvill': 3 P.R.S.N.S. 147. This entry continues until 1198, when Walter has paid in full: 9 P.R.S.N.S. 10.

¹¹⁵ 2 R.C.R. 131.

¹¹⁶ 1 R.C.R. 343; Plac.Abr. 6 (*s.c.*); 2 R.C.R. 42.

the vill of Aspley (Beds.). First, he alleges that they took some of his lands whilst he was away in Normandy on the King's service¹¹⁷: this action he seems to lose.¹¹⁸ Next, during the period 1210-1212, he is suing three actions of novel disseisin against them, on similar grounds, for his other lands in the neighbourhood: and this time he is successful in two of them,¹¹⁹ if not in all.¹²⁰ In one of these latter actions, instead of the customary terse verdict that 'they did (or did not) so disseise him', the assize (*i.e.*, the jurors) recount the history of the matter. What they say is this: 'Roger de Glanvill, the father of Richard, was seised of that land; it then pleased him to cross the sea, and he delivered it to Richard, his son, who held it until he himself crossed the sea . . .; and Richard was seised as of his free tenement',¹²¹

When next we hear of Richard Glanvill, nearly ten years have passed and he is dead. The same Maud (now with a second husband) is suing the present tenants of his Aspley lands, by writ of right; and they vouch to warranty one Henry Glanvill, his nephew and alleged heir—'a crusader in God's service in the Holy Land'.¹²² Several interesting points emerge from this long action.¹²³ It includes, for instance, an allegation by the plaintiffs that they had formerly sued Richard for these lands in the shire court, but had then reached a compromise and had therefore moved the case, by writ of *pone*, to Westminster, in order that their concord might be embodied in a chirograph in the King's Court.¹²⁴ For us, however, its special interest lies in the peculiar and (as I think) ambiguous

¹¹⁷ 3 C.R.R. 117: the parties have left to a jury (which defaults) the question whether Richard was seised of half that vill on the day of his departure. In 18 P.R.S.N.S. 15, the stated area is one carucate.

¹¹⁸ See their allegation in 6 C.R.R. 82; but it may mean that he won, and that they afterwards recovered the land from him by a higher action before the itinerant justices.

¹¹⁹ 6 C.R.R. 120; *ibid.* 358, 376. Unfortunately, he had not joined as co-defendants some of the actual tenants of those lands. These tenants he ejected, in the process of taking the seisin he had won. They then sued novel disseisin against him and recovered their tenement: 7 C.R.R. 17.

¹²⁰ In 6 C.R.R. 82, he may well have failed. Defendants plead that they won this land from him in a previous action, before certain itinerant justices whom they vouch. The jurors are dismissed, and his fate depends upon what is found in those justices' rolls.

¹²¹ 6 C.R.R. 129.

¹²² 8 C.R.R. 304; B.N.B., Nos. 180, 385, 1377, 1625.

¹²³ The tenant-defendants (a husband and wife) begin by vouching Henry de Glanvill, by aid of the court, and produce his charter of 'gift' to them for their homage. The plaintiffs counterplead this voucher, alleging that Henry was never seised except by intrusion in time of war. Defendants answer that Henry entered upon the lands as his inheritance of which his uncle Richard had died seised: 8 C.R.R. 304. Simultaneously (B.N.B., No. 1377), the defendants are suing *de warrantia cartae* against Henry, in order to compel him to warrant them. Two years later, home from the crusades, he duly warrants them and so stands in their place as defendant in the main action: B.N.B., No. 180.

¹²⁴ 8 C.R.R. 304-305. For an even earlier instance of this, after duel waged in the shire court, see 2 R.C.R. 277-278. Cf. Glanv., Bk. 8, cc. 1, 5-9.

formula wherewith the plaintiffs deny that Henry can be Richard's heir. It is true that, at a later stage, they baldly allege that Henry himself is a bastard. But their first allegation seems to be rather wider than that. 'Henry', they say, 'touches Richard by no parental affinity'.¹²⁵ And, in so saying, it is not inconceivable that they remembered the established rule whereby a bastard who (like Richard) leaves no issue can have no heir.¹²⁶

If we are right in assuming that the Roger Glanvill who was this Richard's father is that same Roger Glanvill who married the Countess Gundred, Richard's illegitimacy is undoubted; for, as we have seen, Agnes (Roger's niece) inherited Roger's lands, whilst Richard, his son, neither inherited nor claimed any part of Roger's inheritance. Even in his many actions for the Bedfordshire lands, Richard invariably avoided those forms of action (mortdancestor and writ of right) which might raise the question whether he was his father's lawful heir. That our two Roger Glanvills are identical is difficult to doubt. Our records, such as they are, of the dates at which each crossed the sea and ultimately died, the fact that each bore the same name and description in contemporaneous court and exchequer rolls—the name and description of one well known in official and royal circles—all these seem to identify the two as one person.

¹²⁵ 2 B.N.B., pp. 146, 147.

¹²⁶ Glanv., Bk. 7, c. 16.

NOTES ON RECENT CASES

CHARITABLE TRUSTS — PRIMARY OBJECT OF A POLITICAL NATURE — CRITERION OF BENEFIT TO THE COMMUNITY

- (a) *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1948] A.C. 31.
- (b) *Re Coats' Trusts*, *Coats v. Gilmour*, [1948] 1 Ch. 1; affirmed by C.A., [1948] W.N. 108.

(a) Appellant society claimed exemption from income tax on the income of its investments as being a society of persons established for charitable purposes only, within section 37 (1) (b) of the Income Tax Act, 1918, 8 & 9 Geo. 5, c. 40. One of the professed objects of the society was 'to lead the people of this country to call upon Parliament totally to suppress the practice of vivisection'. A body of special commissioners found as a fact that the object of the society, so far from being for the public benefit, was injurious thereto.

The appeal was rejected by a majority in the House of Lords on two grounds. Firstly, to come within the fourth head of trusts laid down by Lord Macnaghten in *Income Tax Commissioners v. Pemsel*, [1891] A.C. 531 at p. 583 (miscellaneous trusts for other purposes beneficial to the community), it must be shown not only that the intention of the creator of the trust was to benefit society, but that the community was in fact benefited. This had not been shown in this case. The House declined to follow the ruling of Chitty, J., in *Re Foveaux*, [1895] 2 Ch. 501, which held that the intention of the testator was decisive and that the court must adopt a neutral position. They preferred to follow *Re Hummeltenberg*, [1923] 1 Ch. 237, which insisted that whether the trust was for the public benefit must be decided by the court and on the evidence before it. Secondly, the objects of the society being an alteration in the law, the purpose was a 'political' one and so not within the spirit of 43 Eliz. c. 4. Further, exemption from income tax would amount to a State subsidy for the purpose of altering the law.

Lord Porter delivered a dissenting speech in which he urged that the trust was not 'political' since its object might be achieved without the necessity for legislation. Further, the duty of the court was merely to decide whether the object was of a class *prima facie* charitable and then remain neutral.

(b) The plaintiffs were trustees of a sum of money under a declaration of trust for a Carmelite Priory if its purposes were

charitable. The convent comprised an association of strictly cloistered contemplative nuns who engaged in no external activities for the benefit of anyone outside their association. It was urged that they benefited the community by their spiritual intercession.

Jenkins, J., held that their purposes were not charitable. As far as the edification of the public was concerned, their activities were too indirect and incidental to convert the mere advancement of religion among themselves to the advancement of religion among the public. As far as the spiritual advancement of the public was concerned, such a purpose is not charitable in law unless to be achieved by human agency as opposed to Divine benevolence. He preferred to follow *Cook v. Manners* (1871), L.R. 12 Eq. 574, rather than *Maguire v. Att.-Gen.*, [1943] I.R. 238. The latter case, on facts very similar to the case under consideration, held the objects to be charitable.

From these two cases we see that a trust is not 'charitable' if, in the opinion of the court, its objects are injurious to the welfare of the community; nor if its benefit to the community is brought about by supernatural as opposed to human agency; nor if its object is of a political nature, in this case, persuading Parliament to alter the law. On the other hand, as has been emphasised afresh by the decision in *Williams' Trustees v. I.R.C.*, [1947] A.C. 447, the fact that an object is beneficial to the community is not of itself sufficient to make that object 'charitable' in law.

L. A. S.

CONFLICT OF LAWS — PROXY MARRIAGE BY PERSON WITH ENGLISH
DOMICILE—NULLITY—CLASSIFICATION—PUBLIC POLICY

Apt v. Apt, [1947] P. 127; affirmed by C.A., [1947] 2 All E.R. 677.

THE petitioner, resident and domiciled in England, executed a power of attorney authorising a proxy to go through a ceremony of marriage in Buenos Aires on her behalf with the respondent domiciled in the Argentine. Such a marriage was recognised as valid by Argentine law. Revocation of the power, to be effective, had to be communicated to the intended spouse or the proxy before the ceremony. A decree of nullity was sought and jurisdiction was assumed without question.

The matter was considered to relate to the formal validity of the marriage and not to its essence, and, therefore, apart from overriding principles of public policy, to be governed by the law of the Argentine. Cohen, L.J., dealing with the question of public policy, showed that proxy marriages as a class were not repugnant to the

definition of a valid marriage in *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130 at p. 131; that such a marriage, differing only as to conditions of revocation, is recognised in *Swinburne's Treatise* (1686); and that proxy marriages are valid in a number of Christian countries. While admitting that abuses might follow the recognition of all proxy marriages, he pointed out legal contradictions following non-recognition. As to the power of attorney, he showed that had it related to ordinary mercantile matters it would be governed by Argentine law, and the argument that marriage was different in that it created a status was untenable. Lastly, since there had been no attempt by the petitioner to revoke the power of attorney, there was no reason to declare this particular marriage a nullity merely because, apart from voluntary or involuntary loss of capacity, she was not entitled to withdraw the power without notifying the intended spouse or the proxy.

The case shows the restricted application of considerations of public policy in English law by looking more at the particular facts and the results flowing therefrom rather than regarding facts as falling into a class which, as a whole, has harmful tendencies. *Apt v. Apt* does not mean that a decree of nullity will never be granted in the case of a proxy marriage. W. H. R. S.

CONFLICT OF LAWS—WILLS—SUCCESSION TO LAND AND CHATTELS—
CHOICE OF LAW—RENOI UNDER SPANISH LAW

Re Duke of Wellington, Glentanar v. Wellington, [1947] Ch. 506;
affirmed by C.A., [1947] 2 All E.R. 864.

THE Duke of Wellington, who also held the Spanish hereditary title of Duke of Ciudad Rodrigo, made two wills: the first (the Spanish will) bequeathing his movable and immovable property in Spain 'to the person . . . who will on my decease become Duke of Wellington and Duke of Ciudad Rodrigo'; the second (the English will) leaving to the Duke of Wellington absolutely, subject to an administrative trust, all his property except that disposed of by the Spanish will.

On his death his uncle, G., became Duke of Wellington, and his sister, R., succeeded to the Spanish title.

In an action to decide in whom the Spanish property vested, Wynn-Parry, J., held that choice of law rules directed that succession to the movables be governed by the deceased's *lex domicilii*—English law—and succession to immovable property by the *lex situs*—Spanish law; that a reference to Spanish law included Spanish private international law and that he should administer the

latter as though he were a Spanish judge seised of the case (*Jaber Elias Kotia v. Katr Bint Nahas*, [1941] A.C. 403; *Re Ross*, [1930] 1 Ch. 377). From the expert evidence he concluded, as a fact, that a Spanish court would refer to the *lex patriæ*—English law—and that it would not accept *renvoi*. Further, he held that by English law the will failed because no single person fulfilled the qualification of succeeding to both titles; that therefore the Spanish property passed under the English will to G.; and, finally, that the interposition of an administrative trust made no difference.

This decision, unanimously affirmed by the Court of Appeal, applies to the question of succession to immovable property that species of *renvoi* which Cheshire (*Private International Law*) calls the 'Foreign Court Theory' (see also *Re Ross*, *supra*, at pp. 404–405). It also illustrates one of the practical difficulties surrounding that theory since the learned judge was faced with the unenviable task of 'expounding for the first time either in this country or in Spain the relevant law of Spain' on subjects about which it appeared from the expert evidence that there existed 'a profound cleavage of legal opinion in Spain' (at p. 515).

M. M. C.

CONTRACT—C.I.F. CONTRACT—PROVISION FOR TENDER OF DELIVERY ORDER INSTEAD OF BILL OF LADING—DELIVERY OF GOODS PREVENTED BY WAR—FAILURE OF CONSIDERATION—CLAIM FOR REFUND OF PRICE

Comptoir d'Achat, etc. v. Luis de Ridder, [1947] 2 All E.R. 443 (C.A.).

IN a contract made on April 24, 1940, for the sale of rye shipped by S.S. *Julia*, the price was expressed to be c.i.f. Antwerp and payable 'in exchange for . . . bill(s) of lading . . . and/or delivery order(s)' (and specified alternative insurance documents whose delivery the buyer subsequently waived). The buyer paid the price on April 30 on receiving a delivery order.

The Germans subsequently occupied Antwerp, and the *Julia* was diverted while at sea to Lisbon. The seller, who (as the buyer admitted) still owned the rye, sold it there without notifying the buyer.

The buyer sought to recover the amount paid by him, because the consideration therefor had wholly failed.

The majority of the Court of Appeal (Lord Greene, M.R., and Croom-Johnson, J., Asquith, L.J., dissenting) affirmed the decision of Morris, J., and held :—

1. Since a normal c.i.f. contract is properly performed when the buyer receives the bill of lading, invoice and policy of insurance (and not the goods sold), a total failure of consideration cannot be produced 'ex post facto' by subsequent events which deprive the buyer of his usual remedies against the ship or underwriters.

2. This contract must be construed as a c.i.f. contract despite the option to substitute a delivery order for a bill of lading. Although this substitution may result in some obligations being left outstanding in the seller, the tender of a delivery order constitutes performance by him sufficient to negative the allegation of total failure of consideration, thus defeating the buyer's claim.

If (which the court did not need to decide) any such obligations do remain outstanding in the seller after tender of the delivery order, a buyer may now perhaps recover under the Law Reform (Frustrated Contracts) Act, 1943. The Act did not apply to the present action as the contract was discharged before 1943.

According to Asquith, L.J.'s dissenting view, if a ship is diverted (whether through frustration or in breach of contract) before the receipt of the bill of lading, etc., these will have become nullities and therefore no consideration for the buyer's payment. He felt that 'the same result ought to follow if by diverting the goods after tender of the documents the sellers rob them of all meaning and value'.

V. R. de A. W.

CONTRACT—RESTRAINT OF TRADE—DOCTOR'S COVENANT IN
'ASSISTANTSHIP' AGREEMENT—REASONABLENESS—
BURDEN OF PROOF—SEVERABILITY

Routh v. Jones, [1947] 1 All E.R. 758 (C.A.).

THE defendant became medical assistant to the plaintiffs, who were general practitioners, and he covenanted, inter alia, not to 'practise or cause or assist any other person to practise in any department of medicine surgery or midwifery nor accept nor fill any professional appointment . . . whether paid . . . or whether honorary within a radius of ten miles' from the partnership address, for five years after the termination of his assistantship. The assistantship ended in 1946, and the plaintiffs sought an interlocutory injunction to restrain the defendant from practising in the neighbourhood specified.

Evershed, J., refused an injunction ([1947] 1 All E.R. 179). Following Younger, L.J., in *Attwood v. Lamont*, [1920] 3 K.B. 571, he considered that in all cases concerning master and servant the onus

is upon the covenantee to establish both the existence of proprietary interest, and that the covenant sought to be enforced is reasonably required for its protection. Here there was such a proprietary interest, but the restrictions exacted by the plaintiffs exceeded the restraint required for its reasonable protection. He held that even if, as he believed, the covenant was severable, each several part was excessive and void.

The Court of Appeal affirmed this decision. Lord Greene, M.R., held that, the dicta of Lord Birkenhead, L.C., in *Fitch v. Dewes*, [1921] 2 A.C. 158 at p. 162, notwithstanding, the plaintiffs must establish the reasonableness of the covenant. This they had failed to do, since the first part excluded a consultant practice and the second precluded an appointment as health officer, though neither activity constituted competition against the business of the plaintiffs. As the unreasonableness of its components vitiated the covenant as a whole, Lord Greene declined to examine the question of severability. Cohen and Wrottesley, L.JJ., delivered judgments to similar effect, Cohen, L.J., expressing a reluctance to share the views of Evershed, J., as to the severability of the covenant.

No new judicial trend is discernible in this decision, but it does illustrate the increasing reluctance of the courts to sever a covenant in restraint of trade, and it emphasises that in such cases the burden of proof of reasonableness falls upon the covenantee. P. G. C.

CONTRACT—SALE OF LAND—LAW OF PROPERTY ACT, 1925, s. 40 (1)—
ORAL CONTRACT—RECEIPT AS MEMORANDUM—OMISSION OF MATERIAL
TERM—WAIVER

Hawkins v. Price, [1947] Ch. 645.

H., the purchaser, sued P., the vendor, for specific performance of an oral agreement for the sale of her bungalow. To satisfy section 40 (1) of the Law of Property Act he produced an informal receipt given to him for his deposit by P. P. showed that the receipt did not include an agreed term granting vacant possession in two months' time. H. claimed the right to waive the term.

Held, by Evershed, J., that a valid memorandum prima facie means a memorandum recording all the terms of the agreement. Some terms, however, can be waived; as to which can, *Fry on Specific Performance* (6th ed. at p. 243 n.) states that the stipulation must be of no great importance; he cites *North v. Loomes*, [1919] 1 Ch. 378, where it was held that a term that the purchaser should pay his own costs and those of the vendor was of no great importance and could be waived by the plaintiff; on the other hand, *Williams on Vendor and Purchaser* (4th ed., vol. I, at pp. 4 and 5) makes no

suggestion that the term must be of no great importance. However, both agree that the omitted term must be exclusively for the benefit of the party waiving it. Evershed, J., held that, whether Fry or Williams were right, in this case the term was not exclusively for the benefit of the plaintiff, and therefore the receipt was not a sufficient memorandum. Nevertheless, it would seem that, without determining at what point a term ceases to be 'of importance', if the term is an essential part of the bargain then there must be some memorandum of it.

Whether or not oral evidence is permissible to disclose the omission of a term of the agreement is not considered in this case. But the point is covered by *Beckett v. Nurse*, [1948] 1 All E.R. 81 (C.A.), where oral evidence was admitted to show that a receipt being an informal document did not include all the terms of the agreement, following *Phipson on Evidence* (8th ed., Ch. 45, at p. 566). But where the document is a formal record of the contract oral evidence is inadmissible.

J. C. McD.

CONTRACT—THIRD-PARTY RIGHTS—LAW OF PROPERTY ACT,
1925, s. 56 (1)

Re Miller's Agreement, Uniacke v. Att.-Gen., [1947] Ch. 615.

NOAD, Miller and Vos were partners. In 1942 Noad sold his entire interest in the partnership to Miller and Vos, who covenanted with him as part of the transaction to pay certain annuities to his daughters as from his death. The whole partnership property was charged with the payment of the annuities. Noad died in 1943, and the annuities began to be paid. The Crown claimed estate and succession duties from the daughters in respect of their annuities.

Held, by Wynn-Parry, J., (i) that the daughters were only liable to pay duties if they had an enforceable right to the annuities; (ii) that the daughters had no enforceable right either at common law or in equity or under section 56 (1) of the Law of Property Act, 1925, and were therefore not liable.

The court's main task was to decide whether the daughters, who were strangers to the original contract, had a right to the annuities. Wynn-Parry, J., was content on this point to follow the decision in *Re Schebsman*, [1944] Ch. 83. 'At common law, so far as each annuitant is concerned, the deed is *res inter alios acta*, and she has no rights thereunder.' As for rights in equity, 'the effect of the deed is not to create any trust in favour of the annuitant', even though a charge on the partnership property had been created.

The only right that the daughters had at common law, said the

learned judge, was a right to retain any money paid to them under the annuity.

The court then had to contend with that troublesome clause of the Law of Property Act—section 56 (1). A number of unsuccessful attempts have been made to use this section to give third-party beneficiaries a right to sue on a contract. Wynn-Parry, J., categorically refused to give the section such a revolutionary interpretation. ‘I think it emerges’, he said, ‘. . . that the section has not the effect of creating rights but only of assisting the protection of rights shown to exist. Whether or not a right exists is the first question.’

Now that his new method of circumventing death duties has been established, perhaps there is ground for hope that the ten-year-old recommendation of the Law Revision Committee will be enacted and third-party beneficiaries allowed to sue on a contract. D. G. W.

CRIMINAL LAW—AIDING AND ABETTING—RECEIVING STOLEN GOODS—
THIEF CONVICTED AS RECEIVER—SUMMARY JURISDICTION ACT,
1848 (c. 43), s. 5

Carter Paterson and Pickfords Carriers, Ltd. v. Wessel, [1947]
K.B. 849.

CASE stated to the Divisional Court. Wessel had appealed to Quarter Sessions against a conviction by justices of receiving stolen property knowing it to have been stolen, contrary to the Larceny Act, 1916, s. 33. Before the justices, Wessel had been charged on information laid by his employers, Carter Paterson and Pickfords Carriers, Ltd., (i) with larceny of certain goods, contrary to the Larceny Act, 1916, s. 17 (i) (a); and (ii) together with one Lawrence, with receiving the said goods knowing them to have been stolen, contrary to section 33 of the same Act. It appeared that Wessel, who was one of the company's lorry drivers, discovered that of the packages of goods which were in the lorry for consignment to Nottingham two had by error not been entered in his consignment sheets. Before reaching his destination he removed the two packages and deposited them by the roadside. After ending his journey he met Lawrence, with whom he drove back in a car and appropriated the two packages. The justices, for reasons not stated, acquitted Wessel of the offence of larceny as a servant, but convicted both Lawrence and Wessel of receiving the goods knowing them to have been stolen. Lawrence did not appeal, but Wessel appealed to Quarter Sessions against his conviction for receiving. At the appeal the Recorder held that, while on the facts Wessel might have been convicted of stealing, he could not be convicted of receiving, and he therefore

quashed Wessel's conviction. The prosecution then appealed to the Divisional Court by way of case stated. The Divisional Court (Lord Goddard, C.J., Macnaghten and Lynskey, JJ.) allowed the appeal and sent back the case to the Recorder with an intimation that Wessel's appeal to him should be dismissed, and that the Recorder should consider the appropriate penalty which he should inflict upon him. Lord Goddard indicated that although Wessel could not be convicted of receiving as a principal in the first degree since he 'had not parted with felonious possession of the goods and he certainly did not receive them from any person after they had been stolen', yet his conviction for receiving ought not to have been quashed since (a) he had aided and abetted the commission of that offence by Lawrence, and by virtue of the Summary Jurisdiction Act, 1848, s. 5, every person who aids, etc., the commission of any offence punishable on summary conviction is liable to be convicted for the same and to be punished in the same way as the principal offender; and (b) one of the offences which may be dealt with summarily is an offence under the Accessories and Abettors Act, 1861, s. 8.

H. K. Y. L.

[Mr. J. W. C. Turner has kindly contributed the following observations upon the above decision.]

It is respectfully submitted that this decision presents some difficulties, which, owing to exigencies of space, can only be outlined here.

1. Wessel was acquitted by the justices of the felony of stealing the goods. There is no appeal to Quarter Sessions against acquittal, so that the only mode of appeal open to the prosecution was by case stated to the Divisional Court: this course they did not take, and therefore the matter became *res judicata* so far as Wessel was concerned, the competent court having decided that he did not steal the goods. It would seem from the reports of the case that on the facts before any of the courts who considered this case there was no shred of evidence that anyone stole these goods if (as the justices had decided) Wessel did not steal them. It would appear then that it was not open either to the Recorder or to the Divisional Court to hold (at least as against Wessel) that the goods were stolen at all. If this is so it is difficult to understand how Wessel's conviction for receiving could properly be upheld, for it is surely impossible to interpret the Acts of 1848 and 1861 as establishing that a person can be convicted of aiding, etc., the commission of an offence when there is no evidence that such offence has been committed.

2. The second difficulty is one of less substance. The Divisional

Court rested their decision on the combined effect of the cited sections of the Acts of 1848 and 1861. Section 5 of the former Act relates to offences which may be dealt with summarily: this clearly means offences committed by the principal offender. In our case this was Lawrence, against whom the charge was that of feloniously receiving goods which had been feloniously obtained. Section 8 of the Act of 1861 deals with any person who 'shall aid, abet, counsel or procure the commission of any misdemeanor', such person being declared to be 'liable to be tried, judicated and punished as a principal offender'. Since Lawrence, the principal offender, was convicted of felony and not of misdemeanor, how could this section apply to Wessel?

On the other hand, it is not easy to see how the section could apply to Lawrence, for it makes no provision for dealing with a principal offender summarily; the summary trial of Lawrence depends on the Criminal Justice Act, 1925, s. 24 and Second Schedule; and the power to indict, try and punish as a principal offender anyone who aids, etc., in the commission of an offence under section 33 of the Larceny Act, 1916, would seem to be given by section 35 of the same Act.

J. W. C. T.

CRIMINAL LAW—BROADCASTING FOR ENEMY—INTENT TO ASSIST ENEMY
—BURDEN OF PROOF—DURESS—DIRECTION TO JURY

R. v. Steane, [1947] K.B. 997 (C.C.A.).

THE appellant was convicted before Henn Collins, J., on a charge of doing acts likely to assist the enemy 'with intent to assist the enemy' (reg. 2A of the Defence Regulations, 1939) by broadcasting in Berlin during 1940. He admitted his broadcasts but swore that he had no intention of assisting the enemy, his assistance was purely technical and he was in constant fear for his family, threatened with a concentration camp.

The Court of Criminal Appeal quashed the conviction. Lord Goddard, C.J., delivering judgment, said that, while the evidence entitled the jury to infer such acts were likely to assist the enemy, it was 'a far more difficult question' whether those acts were done with intent to assist. The jury had been told that a man is taken to intend the natural consequences of his act, and so, if he did an act likely to assist the enemy, it must be assumed he did it with that intention. But the court observed 'that where the essence of an offence, or a necessary constituent of an offence, is a particular intent, that intent must be proved by the Crown just as much as any other fact necessary to constitute the offence'. Lord Goddard also

pointed out that different considerations applied where an act was done in subjection to a brutal enemy and where action was free and uncontrolled. It was impossible to infer that he intended the natural consequences of an act, done under enemy subjection, from the mere fact that he did it. His act, too, might be equally consistent with an innocent intent, *e.g.*, a desire to save his wife and family from a concentration camp.

The question of intent had been confused by talk about duress. The court, while recognising duress as a defence, and a good defence, to a misdemeanour, insisted that no question of duress could arise until the intent laid in the indictment were proved to the jury's satisfaction.

Guilty intent could not be assumed, but must be proved. Moreover, the judge had not reminded the jury of various threats to which the prisoner swore he had been exposed. On these two grounds the conviction was bad.

The case turned on the principle that the burden of proving specific intent remains throughout on the prosecution. The dicta on duress, a rare topic, emphasise the lack of authority which makes its exact extent as a defence uncertain. D. E. C. Y.

LANDLORD AND TENANT — PERIODIC TENANCY — DATE OF EXPIRY OF NOTICE TO QUIT—VALIDITY OF ALTERNATIVE FORM OF NOTICE

(a) *Crate v. Miller*, [1947] K.B. 946 (C.A.).

(b) *Addis v. Burrows*, [1948] 1 All E.R. 177 (C.A.).

(a) The plaintiff let a furnished room to the defendant on a weekly tenancy beginning on a Saturday. The plaintiff's solicitors sent him a notice to quit dated Friday, July 5, 1946, in these words: 'We hereby give you notice that the landlord will terminate your tenancy on Friday, July 19, 1946, or at the end of the next complete week of your tenancy from the date hereof, on which date you are hereby required to quit and deliver up possession'.

Delivering the judgment of the Court of Appeal, Somervell, L.J., applied the case of *Sidebotham v. Holland*, [1895] 1 Q.B. 378, where it had been held that notice to quit on the anniversary of either the entry or the day before was a good notice for a yearly tenancy. There was authority for extending this principle to weekly tenancies in *Queen's Club Gardens Estates, Ltd. v. Bignell*, [1924] 1 K.B. 117, as that case had laid down that all periodical tenancies, whether yearly, quarterly, monthly or weekly, should in this respect be treated on the same principle. 'Therefore', said Somervell, L.J. (at p. 948), 'a notice to quit on either day could be construed as a

notice to quit when the current period in question ended.' The court, incidentally, disapproved of the expression 'Saturday to Saturday tenancy', since, strictly speaking, a weekly tenancy beginning on Saturday expires at midnight on the following Friday.

Turning to the use of the alternative notice, 'or at the end of the next complete week of your tenancy from the date hereof', Somervell, L.J., observed that here the alternative purported to run from the date of the notice and was therefore ineffective; for in fact a notice to quit does not operate until it is served on the tenant, and the present notice was not served until three days after it was written.

(b) In *Crate v. Miller*, *supra*, the Court of Appeal left open the question whether this alternative notice would have been valid if it had purported to run from the date it was served. Notices to quit, so framed, have been customary for many years; but the objection has been raised that they put the tenant to the difficulty of calculating for himself the date at which his tenancy is to end. In *Addis v. Burrows*, however, the Court of Appeal has now ruled that this objection is unfounded, where (as is ordinarily the case) the tenant's lease and the notice together supply sufficient data for making the calculation. There a yearly tenancy, determinable by half a year's notice, was held to be duly determined by a notice to quit 'at the expiration of your tenancy which will expire next after the end of one-half year from the service of this notice'. The court held, moreover, that such a notice to quit is sufficient in itself: it need not be expressed, in the traditional fashion, as an alternative to quitting on some named day.

J. C. H.

LICENCE FOR VALUE—NO PROVISION AS TO REVOCATION—REVOCABILITY
—REASONABLE NOTICE

Winter Garden Theatre (London), Ltd. v. Millennium Productions, Ltd., [1948] A.C. 173.

THE plaintiffs were the licensees for value of the defendants' theatre under an agreement containing no express provision for its termination by the licensors. The defendants gave the plaintiffs notice to terminate the licence. The plaintiffs claimed a declaration (1) that the licence was not revocable by the defendants; (2) that if it was such revocation did not become effective until the lapse of a reasonable time from notice thereof and that such time had not elapsed. The House of Lords, reversing the Court of Appeal, decided against the plaintiffs upon both points.

Upon the second point the House thought that the time given

was, in fact, sufficient, although their Lordships were not agreed as to whether in Lord Uthwatt's words 'the notice given must be a reasonable notice or whether it may be a notice operating at once to determine the licence, the licensees in that event having a reasonable time within which to vacate the theatre'. Upon the first point the House decided that the true interpretation of the agreement was that the licence was revocable. The plaintiffs failed to convince their Lordships that such agreements were *prima facie* irrevocable although Lord MacDermott thought that even if they were this one 'negatived quite definitely the idea of irrevocability'.

The House also approved the Court of Appeal's decision in *Hurst v. Picture Theatres, Ltd.*, [1915] 1 K.B. 1, that where a licence for value to enter premises to witness an event is wrongfully revoked the licensee cannot be treated as a trespasser if he refuses to leave. This opinion, although strictly obiter, is of interest in view of previous doubts as to *Hurst's Case* (*Salmond on Torts*, 10th ed., p. 248; Cheshire, *Modern Real Property*, 5th ed., p. 240), founded on the view that it was in conflict with the well-known case of *Wood v. Leadbitter* (1845), 13 M. & W. 838.

The majority of the court in *Hurst's Case* thought that even if *Wood v. Leadbitter* was rightly decided the Judicature Acts had altered the position, and they held that the licensee there had a licence coupled either with a grant or with a contractual right not to have the licence revoked enforceable by injunction: accordingly the licence could not be revoked in equity. After 1873 all courts must give effect to equitable rights, and no court can describe as a trespass that which a man has an equitable right to do.

This reasoning, now approved by the House of Lords, does not apply to a licence for value containing or implying a contract not to revoke where such contract is not enforceable in equity by injunction. There, perhaps, *Wood v. Leadbitter* would still apply, and Viscount Simon's dictum that it now has no authority may not extend to this one matter.

C. J. C.

MONEY PAID BY MISTAKE — MISTAKE OF LAW — MONEY HAD AND
RECEIVED — RIGHT TO FOLLOW AT COMMON LAW — EQUITABLE
DOCTRINE OF TRACING

Re Diplock, Diplock v. Wintle, [1947] Ch. 716.

By his will, Caleb Diplock left the residue of his property to his executors upon trust to sell the same and divide the net residue 'between such charitable institution or institutions, or other charitable or benevolent object or objects' as they might in their

absolute discretion think fit. The executors had distributed over £200,000 among 139 charitable institutions when the next of kin challenged the validity of the residuary gift. The executors immediately informed the recipients of this fact, and the residuary gift was subsequently held void by the House of Lords: *Chichester Diocesan Fund, etc. v. Simpson*, [1914] A.C. 341. In the present action the next of kin sought a declaration that the charities were liable to refund the moneys paid to them. The plaintiffs admitted that it was not open to them in a court of first instance to maintain that the defendants took with notice of the trust.

Wynn-Parry, J., held, (i) that the common law action for money had and received lay only where the plaintiff paid under a mistake of fact. The executors' mistake was either as to the technical requisites for creating a valid charitable trust or as to the construction of the will: in each case a mistake of law; (ii) that the plaintiffs had no analogous personal claim in equity, because there was neither a mistake of fact nor were the circumstances such as to make the defendants express trustees; (iii) that where the defendants had paid the money into a general account, as most of them had, the right to follow the money at common law ceased, because the means of identification failed; (iv) that in these cases there was no equitable right of tracing and entering the defendants' accounts, because there was no fiduciary relationship between the next of kin and the recipients at the time of paying in.

Head (ii) virtually stands or falls with (i), which is certainly questionable. The crux of the judgment is (iv), which is based upon an exhaustive analysis of *Re Hallett's Estate* (1880), 13 Ch.D. 696, and *Sinclair v. Brougham*, [1914] A.C. 398. The learned judge's interpretation of the effect of the latter case upon the former is very acute, but probably too cautious, and the argument for the plaintiffs, at pp. 756-757, appears more in harmony with that enlarged view of fiduciary relationship set out, in particular, by Lord Parker, [1914] A.C. 398 at p. 442. Denning, J., in *Nelson v. Larholt*, [1948] 1 K.B. 339, appears to favour this view. C. T. B.

The following comments are offered on that part of the judgment in *Re Diplock*, *supra*, which relates to the equitable right to trace.

The equitable right of a beneficiary to trace trust property is wider than the common law right of following an asset. Whilst the common law right stops when the identity of the asset is lost, the equitable right to trace can be exercised even where a person other than the true owner pays trust money into his bank and mixes it with other money, so that the identity of the property is lost. There is, however, one indispensable condition for the exercise of this

equitable right. It is essential to show the existence of a fiduciary relationship between recipient and beneficiary.

In the two cases of *Re Hallett's Estate* (1880), 13 Ch.D. 696, and *Sinclair v. Brougham*, [1914] A.C. 398, the equitable rules relating to tracing are to be found. Of the latter, Wynn-Parry, J., said (at p. 771) that it clearly establishes that 'where trust moneys are paid by a recipient thereof into his banking account and there mixed with his own moneys (in which event the identity of the trust moneys is lost in fact), their identity will be preserved in the eye of equity if at the time of payment in the recipient can be said to be a fiduciary agent'. There is no foundation in the authorities for the plaintiffs' contention that a fiduciary relationship is only material at the end of the inquiry when it has been shown as a result of a tracing order that a superfluity exists in the hands of the defendant, or, in other words, that when a superfluity is shown to exist a fiduciary relationship arises automatically. This relationship must be shown to exist from the beginning. On the facts, no fiduciary relationship could be shown to exist between recipient and beneficiary. Such relationship only came into existence when the defendants were given notice that the next of kin intended to contest the validity of the trust, and it was only from that time that the defendants became trustees, and then only of such money as they still retained and had not mixed with other money in their banking account before that date.

The rule relating to volunteers who take trust property is frequently stated to be that a volunteer who receives trust property, whether with or without notice, becomes a constructive trustee of it. This suggests that a fiduciary relationship automatically exists by reason of a volunteer receiving property impressed with a trust. It might have been thought on the facts of this case that a fiduciary relationship was created when the defendants, who were volunteers, came into possession of the trust property. (In *Sinclair v. Brougham*, the money paid over to the building society was not trust money, so it was necessary to find other fiduciary relationship.) Apparently this is not the case. Something more is required to establish a constructive trust than mere receipt of trust money by a volunteer. A fiduciary relationship has to be shown to exist independently of this. One way of supplying this extra element is to inform the recipient of the existence of the trust. From the time of such notice a constructive trust springs up, but can only fasten on such property as may be in the possession of the recipient and has not been mixed with his other money in a banking account. It may be that a more accurate way of stating the rule relating to volunteers would be to say that volunteers who receive trust property and knowingly deal with it in a manner inconsistent with

the trust become constructive trustees of it. Such a conclusion appears to be supported by dicta in the cases of *Lee v. Sankey* (1872), L.R. 15 Eq. 204 at p. 211, and *Soar v. Ashwell*, [1893] 2 Q.B. 390 at p. 396. [It is understood that the decision in *Re Diplock*, *supra*, is now under appeal.]

P. D. T.

PERPETUITIES — OPTION TO PURCHASE LAND — NO TIME-LIMIT FOR
EXERCISE—SPECIFIC PERFORMANCE AGAINST ORIGINAL
GRANTOR OF OPTION

Hutton v. Watling, [1948] 1 Ch. 26.

IN a home-made document of September 6, 1937, signed by defendants, embodying the terms of an agreement between them and the plaintiff for sale to her of the goodwill, stock and fixtures of a business, it was stated that 'in the event of purchaser wishing at any future date to purchase property in which the business is situated, she has the option of purchase at a price not exceeding £450'. By a later letter, plaintiff purported to exercise the option. Defendants conceded that if the option was valid, the letter was an effective exercise of it.

Jenkin, J., held that the plaintiff was entitled to specific performance, and that the rule against perpetuities was no bar. It does not affect the enforceability of such an option as between the original contracting parties. Where the matter is merely the enforcement of a personal covenant between the original parties, the jurisdiction of specific performance is not founded on any equitable interest that arises from the contract, but upon the contract itself, with which the rule against perpetuities has no concern: dicta in *S.E. Ry. v. Associated Portland Cement, etc.*, [1910] 1 Ch. 12, followed.

Although in *L. & S.W. Ry. v. Gomm* (1882), 20 Ch.D. 562, and *Worthing Corporation v. Heather*, [1906] 2 Ch. 532, specific performance of such an option was refused, in each the claim for specific performance was brought, not against the grantor of the option but against his successor in title. Accordingly, since the plaintiff had no right of action at common law, his action was necessarily based upon the equitable interest which the option had implicitly given him in the defendant's land. This equitable interest was contingent, and therefore within the rule against perpetuities, since it would not arise unless and until the option was exercised.

The present case makes it clear that where such an option, unlimited in time, is sought to be enforced against the original

grantor, he can be liable for specific performance as a matter of personal obligation, which is outside the ambit and *raison d'être* of the rule against perpetuities; but, as against a successor in title of the grantor, such an option unlimited in point of time will be void, since it could only operate as an equitable interest which is too remote. Had it, on the true construction of the document, been limited to the grantee's life, it would have been valid even against such successors.

G. E. C.

TORT—BREACH OF STATUTORY DUTY FOUNDING LIABILITY IN TORT—
CONSTRUCTION OF STATUTES—BETTING AND LOTTERIES, ACT, 1934

Cutler v. Wandsworth Stadium, Ltd., [1948] 1 K.B. 291 (C.A.).

THE action was brought by a bookmaker, alleging that the licensees of a dog-racing track had failed to allot a convenient space for bookmakers in contravention of the Betting and Lotteries Act, 1934, s. 11 (2).

The question whether the breach of a statutory duty will found an action in tort can be determined only by the construction of the particular statute as a whole. The Court of Appeal, reversing Oliver, J., held that the statute was not intended by the Legislature to confer any civil right upon bookmakers.

Lord Greene, M.R., construed the statute as being for the benefit of the public, and not for the protection of a particular class. The penalties of the statute were very severe. The term 'bookmakers' was too vague to permit rights to be conferred upon them as a class, and might lead to the absurd result that as many bookmakers as wished could demand a convenient space within a stadium upon a particular occasion. Moreover, if the right were to be recognised, the difficulty of assessing damages might, in certain circumstances, be insuperable. In his opinion, the statute provided 'facilities for the public to bet', and its object was not to enable bookmakers to carry on the business of bookmaking.

In earlier cases the courts attached more importance to the point whether the statutes referred specifically to a particular class of the community, thus implying an intention to safeguard their rights. Lord Greene, M.R., evidently thought this of minor importance, and though he referred to the vagueness of a class defined by such a wide term as 'bookmakers', he did not mention that other sections of the public protected by statutes have been described with an equal lack of precision.

Though the decision must primarily be regarded as one on the particular statute, the unanimity and emphasis with which the court

arrived at its conclusion leaves the impression that the Court of Appeal is reluctant to assume that a statute, criminal in nature, is intended to confer a civil right, and will be zealous to find that no such right was intended. The case of *Clarke and Wife v. Brims*, [1947] K.B. 497, may be regarded, perhaps, as further evidence that this is the present trend.

N. L. H.

TORT — DANGEROUS STRUCTURES — PLAYGROUND — DUTY TO CHILD
LICENSEE—NO LIABILITY UNLESS CONCEALED DANGER KNOWN TO EXIST

Sutton v. Bootle Corporation, [1947] K.B. 359 (C.A.).

S., a girl aged nine, who was playing in a recreation ground owned and occupied by Bootle Corporation, attempted to board a moving swing. In so doing she was swept off her feet and seriously injured a finger. She sued the corporation for breach of duty as occupier of the playground. The judge of assize found that the finger was crushed in a checking device on the swing, which had been supplied by a well-known firm and was similar in design to many others in playgrounds all over the country.

The Court of Appeal held that the defendants were not liable on the grounds that S. was a licensee on their premises and their duty accordingly was only to warn her of any concealed dangers which they knew to exist. Asquith, L.J., in the course of his judgment (at p. 366), declared that 'persons entering on premises in the occupation of others (otherwise than under a contract) are classifiable exhaustively as either trespassers, licensees or invitees'. He thus finally disposed of the suggestion made by Maugham, L.J., in *Purkis v. Walthamstow Borough Council* (1934), 151 L.T. 30, that there might be an intermediate class. Following *Coates v. Rawtenstall Corporation* (1937), 157 L.T. 415, he emphasised that there was no special class of persons entitled to enter premises under the control of public bodies 'as of right', and showed that neither *Ellis v. Fulham Borough Council*, [1938] 1 K.B. 212, nor *Glasgow Corporation v. Taylor*, [1922] 1 A.C. 44, was inconsistent with this view, as, whatever the terminology used, the whole of the latter case proceeded on the assumption that the corporation there knew of the existence of the concealed trap.

The court, while refusing to decide whether the swing constituted an allurement to a child, pointed out that there seems to be no case where a plaintiff relying on an allurement has succeeded, 'save where there was actual knowledge by the defendants that the alluring object was dangerous' (*per* Asquith, L.J., at p. 369).

It is worth noting that the duty of occupiers to licensees was further examined in *Rochman v. J. & E. Hall, Ltd.*, [1947] 1 All E.R. 895, where it was re-emphasised that the duty to warn a licensee of concealed traps was limited to those of which the occupier had actual, as distinct from potential, knowledge.

D. V. G.

TORT—FALSE IMPRISONMENT—ARREST WITHOUT WARRANT—DUTY TO
INFORM SUSPECT OF THE NATURE OF THE CHARGE

Christie and Another v. Leachinsky, [1947] A.C. 573.

THE House of Lords has affirmed the decision of the Court of Appeal, [1946] K.B. 124 (noted [1946] 9 C.L.J. 249).

Leachinsky was arrested without a warrant by two police officers, purporting to act under the authority of the Liverpool Corporation Act, 1921, on a charge of 'unlawful possession' of a bale of cloth. The Act, in the particular circumstances, gave no right of arrest. The police officers pleaded that at the time of the arrest they also had reasonable and probable cause for suspecting, and did in fact suspect, that Leachinsky had stolen or feloniously received the cloth. As Leachinsky had never been told of this ground for his arrest, but had been given another, and incorrect, ground, he was held entitled to damages for false imprisonment.

Five propositions, applicable to arrest without a warrant by both private persons and policemen, may be said to be supported by the authorities. In brief, (1) On arrest without a warrant the suspect must in ordinary circumstances be informed of the true ground of arrest. (2) If he is not so informed, but is nevertheless seized, the person effecting the arrest is ordinarily liable for false imprisonment. (3) The duty to inform naturally does not exist if the circumstances are such that the suspect must already know the general nature of the alleged offence (*R. v. Howarth* (1828), 1 Mood. 207). (4) It is not necessary that technical or precise language should be used (*R. v. Ford* (1817), Russ. & Ry. 329). (5) The suspect cannot complain if he himself produces the situation which makes it practically impossible to inform him, e.g., by immediate counter-attack or by running away (*Mackalley's Case* (1611), 9 Co.Rep. 65b).

The first two propositions, although not previously the subject of express decision, are implicit in the authorities quoted, and, in any case, as a man may forcibly resist an illegal arrest (*R. v. Curvan* (1826), 1 Mood. 132), he must obviously have an opportunity of knowing whether the arrest is legal or not. 'Blind, unquestioning

obedience is the law of tyrants and of slaves : it does not yet flourish on English soil.' (Lord Simonds, [1947] A.C. at p. 591.)

F. J. O.

TORT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—COLLISION AT SEA
—APPORTIONMENT OF BLAME

Boy Andrew (Owners) v. St. Rognvald (Owners), [1948] A.C. 140.

THE *S.R.* was overtaking the *Boy Andrew* on the starboard side at a distance of 100 feet in a swept channel 300 feet wide. When her stem was level with the stern of the *Boy Andrew*, the latter, negligently and contravening a statutory duty to keep her course, swerved hard to starboard, and a collision followed. The assessors advised that passing at 100 feet was, in the circumstances, negligent.

The House of Lords (Lord MacDermott dissenting), approving Greer, L.J., in *The Eurymedon*, [1938] P. 50, held that the negligence of both ships continued up to the collision and that each was to blame for the damage resulting therefrom. The blame was apportioned two-thirds to the *Boy Andrew*, one-third to the *S.R.*

In a decision which turned on a finding of fact, items of general interest [since the Law Reform (Contributory Negligence) Act, 1945, extended the principle of the Maritime Conventions Act, 1911, to contributory negligence in general] are the re-affirmation of causation as the principle underlying the rules of contributory negligence, and an indication of the loss in importance of that test of liability known as the 'last opportunity' rule. Criticising the term 'last opportunity', Viscount Simon said: 'The question, as in all questions of liability for a tortious act, is not who had the last opportunity of avoiding the mischief but whose act caused the wrong'. Lord Porter observed that, in cases arising on land or by sea, 'the problem should be approached broadly, avoiding those fine distinctions which are apt to be drawn when some slight act of negligence on the part of the plaintiff might defeat his claim altogether'.

This and other decided cases, e.g., *Cakebread v. Hopping Bros.*, [1947] K.B. 641 (C.A.), add point to the extra-judicial opinion of Denning, J., in 63 L.Q.R. at p. 518. It is to be noted, however, that, though of reduced importance, this inaptly-named 'last opportunity' test has not wholly disappeared, as is seen from the speech of Lord MacDermott in the present case: appropriate circumstances may still invoke its aid.

J. A. C. T.

TORT—NEGLIGENCE—HOSPITAL AUTHORITY—LIABILITY FOR EMPLOYEES
—JOINT TORTFEASORS—APPORTIONMENT OF DAMAGES

Collins v. Hertfordshire C.C., [1947] K.B. 598.

OWING to the negligence of K., the acting resident house surgeon, and of P., the pharmacist, of a hospital, and to their disregard of the regulations (which regulations had not been brought to K.'s notice), a lethal mixture was prepared for injection into C., a patient, instead of the harmless anæsthetic ordered by H., a visiting surgeon. C.'s life might have been saved had K., as she should have done, realised and drawn attention to the reason for his convulsions.

In this action by C.'s widow, Hilbery, J., held the hospital authority liable for allowing a negligent system to exist, and for the negligences of K. and P., but not for the negligence of H.; and H. liable for his own negligence in failing to check the correctness of the mixture.

The 'hospital cases' up to 1938 are discussed by Professor Goodhart in 54 L.Q.R. 553. In *Gold v. Essex County Council*, [1942] 2 K.B. 293, the Court of Appeal held a hospital authority liable for the negligence of a radiographer in its employ.

Some doubt exists as to whether the basis of this liability is the failure to discharge an obligation to provide competent treatment or vicarious liability for the torts of servants; probably it is both. On either view a hospital authority is not liable for the negligence of visiting surgeons and physicians: its duty is no more than, as it were, to introduce the patient to them, and it cannot control the manner of their work. Probably it is liable for the negligences of everybody else it employs; although the authorities on nurses conflict and a difficulty arises where nurses and attendants are under the control of a surgeon, *e.g.*, in an operating theatre. The present case covers house surgeons and pharmacists.

Hilbery, J., held, further, following his own decision in *Smith v. Bray* (1939), 56 T.L.R. 200, that the test in apportioning damages between joint tortfeasors was the extent to which the negligence of each caused the damage. A contrary view, that 'blameworthiness' or 'culpability' was the test, was taken by Hallett, J., in *Weaver v. Commercial Process Co.* (1947), 63 T.L.R. 466, where he reviewed the authorities on the subject. In *Whitby v. Burt, Boulton and Hayward, Ltd.*, [1947] K.B. 918, Denning, J., it seems, agreed with this latter view; he directed that one joint tortfeasor recover a complete indemnity from the other.

J. P. F. E. W.

BOOK REVIEWS

Essays in Law and History. By SIR WILLIAM S. HOLDSWORTH, formerly Vinerian Professor of English Law in the University of Oxford, and Fellow of All Souls College, Oxford. Edited by A. L. GOODHART and H. G. HANBURY. [Oxford: Clarendon Press (Geoffrey Cumberlege). 1946. xvi and 302 pp. 20s. net].

THIS memorial volume contains seventeen essays selected from the writings of the late Sir William Holdsworth, together with his portrait as frontispiece. An editorial preface indicates the scope and content of each essay and pays due tribute to the memory of that great and kindly scholar. We are reminded, as indeed these essays show, that his learning and his interests in the law were not simply historical and that for him the true function of legal history was rather to illustrate and assist the development and progress of our law than to encourage adherence to the past or present.

Most of the essays collected here have already been printed in legal periodicals. In point of time, they range from 'Martial Law Historically Considered' (1902) to 'Law Reporting in the 19th and 20th Centuries' (1941). In subject-matter, they range from 'The Place of English Legal History in the Education of English Lawyers' (1910) and the historical treatment of topics such as Equity and the Reform of the Land Law, to problems in the modern law of secret trusts, quasi-contract and libel and the question whether International Law is part of the Law of England. And, in each essay, there is a masterly simplicity of style and approach which simplifies both the particular topic and the subject in which it lies.

There is fascinating reading here for every lawyer. To the Cambridge Law School, moreover, there are points of special interest: *e.g.*, the proper place of legal history in a legal curriculum (pp. 34-36); arguments, in opposition to Maitland (who 'touched nothing which he did not illuminate'), for studying equity as a separate subject (pp. 184-187); the suggestion that our University Press should publish an omnibus edition of all that Maitland ever wrote (p. 218); and the essay entitled 'Unjust Enrichment', which clarifies the scope and background of quasi-contract and (pp. 246-255) resists suggestions, from Professor Winfield, Lord Wright and others, that the remedy should be based simply upon unjust benefit. In this controversy, it is true, Sir William supported the existing law and its historical foundations against its critics; but he did so chiefly on the ground that the change proposed would make the

law unduly indefinite. That he was no opponent of reform is clear, I think, from his sympathy with the Property Legislation (Essay 5) and his assaults upon *Re Keen* and *Hulton v. Jones* (Essays 10 and 16). It well may be that he preferred orderly to catastrophic reform: he certainly had (as in Essay 5) an exceptional power of analysing the changes, past and recent, in a particular field of law and revealing their steady continuity of progress. But it is clear that legal history was for him a servant of the law, not its master. When J. H. Round criticised our law, for continuing to follow an established precedent after proof that it was historically unsound, Holdsworth defended it (p. 24): 'If it were not so, the law would be wholly uncertain; and for certainty in the law a little bad history is not too high a price to pay'.

All who are interested in our law and in the world-famous scholar who compiled its history will value this collection of his writings, and will find pleasure and profit in them. The explanatory preface, the indexes and the Table of Cases are admirable accessories. To the learned editors who selected these essays for publication we owe our gratitude.

S. J. B.

Recognition in International Law. By H. LAUTERPACHT, M.A., LL.D.
Cambridge Studies in International and Comparative Law,
Vol. 3 [London: Cambridge University Press. 1947. xx and
442 pp. 25s.].

PROFESSOR LAUTERPACHT'S contributions to the study of the law of recognition which appeared in the course of the last ten years had long raised the hope for a comprehensive work from the same author. This hope has now been fulfilled, and the new book is a valuable addition to the vast literature on recognition. It is distinguished by a strictly legal approach to the subject, close logical reasoning and constant reliance upon the practice of Great Britain and the United States for the purpose of illustrating and supporting the author's views.

Professor Lauterpacht holds that given certain conditions recognition of States, of Governments and of belligerency is a legal duty. This leads him to adopt the constitutive view of recognition, but in establishing that the act of recognition is at the same time declaratory of the facts which go to make up a State or Government, he finds it possible to accommodate to a certain extent the declaratory view of recognition within his system. The term declaratory is thus used in a sense which differs somewhat from that in which it is employed in the law of procedure.

The circumstances under which recognition is granted are examined in detail as are the conditions which States have been

inclined to attach to it. *De facto* recognition, recognition of insurgents (including the position of unrecognised insurgents), implied recognition and non-recognition are all discussed in detail and in a spirit of constructive criticism. The result is an exhaustive exposition of the law of recognition, strictly coherent and determined only by law, yet highly individual in its manner of presentation. A number of opinions of the Law Officers of the Crown, mostly unpublished, are printed in appendices.

It is to be hoped that one of the effects of this work will be to stimulate students to examine the practice in matters of recognition of other countries where studies of the character of Professor Lauterpacht's work are still largely wanting.

K. L.

The Stair Society, Vol. X. The Register of Brieves as contained in the Ayr MS., the Bute MS. and Quoniam Attachiamenta. Edited by the Rt. Hon. LORD COOPER, LL.D. [Edinburgh: J. Skinner & Co., Ltd. ix and 354 pp].

Thomas Thomson's Memorial on Old Extent. Edited by J. D. MACKIE, C.B.E., M.C., M.A., Professor of Scottish History and Literature in University of Glasgow [Edinburgh: J. Skinner & Co., Ltd. 1946. ix and 331 pp.].

The Stair Society, Vol. XI. Regiam Majestatem and Quoniam Attachiamenta, based on the text of Sir JOHN SKENE. Edited and translated with introduction and notes by the Rt. Hon. LORD COOPER, LL.D. [Edinburgh: J. Skinner & Co., Ltd. 1947. xv and 392 pp.].

THESE are the 10th and 11th volumes of the publications of the Stair Society, founded in 1934 'to encourage the study of the history of Scots Law'. The chief task which the Society has set itself is the printing and editing of early material.

Volume X. This contains two contributions, (1) the Ayr MS., the Bute MS. and the styles of brieves which form the Appendix to Quoniam Attachiamenta; and (2) Thomas Thomson's Memorial on Old Extent. The first three mentioned are collections of styles (*Anglice* precedents) mostly now printed for the first time. They relate to—but do not fully cover—the legal system which prevailed in the developed parts of Scotland between about 1280 and 1350. They are all concerned with royal writs and seemingly were compiled by practitioners or chancery officials for their own use.

The Ayr MS. is ascribed to the reign of Robert I (1306–29). It comprises, (1) Conveyancing writs; (2) Administrative writs, e.g., passports and grants of trading privileges; and (3) Forms of process. The Bute MS. was probably completed between 1371–90,

and relates to the practice of a period from 50 to 100 years later than the Ayr MS. In substance it is an expanded edition of the Ayr collection. The briefs from *Quoniam Attachiamenta* cannot be closely dated, but belong at latest to the fourteenth century. Their interest lies mainly in their correspondence even in detail with the Ayr and Bute MSS.

Lord Cooper's introduction is masterly by reason of its learning and its lucidity, and adds greatly to the value and appeal of the work. It is well calculated to whet the appetite for further research. The textual notes are helpful. One minor point may be mentioned—it is doubtful if the obligation to support a pauper (Ayr MS. LXXVI) ever fell on his 'friends'. More likely in this context 'amicis' denotes 'relations'.

Thomson's Memorial. Old Extent was a valuation put on lands throughout Scotland for the purpose of taxation. It is generally believed to have been made in the reign of Alexander III (1249–86). It amounted to about 50,000 marks for all Scotland. Later the measure of Old Extent—and thus of liability to taxation—became in some circumstances the basis of franchise. The Memorial was produced by Thomson on behalf of the pursuer in the case of *Cranstoun v. Gibson* (May 16, 1818, F.C.), in which the pursuer appealed against the enrolment of the defender as a freeholder (with a Parliamentary franchise) in Midlothian. In the course of the Memorial the history of taxation in Scotland was examined and it made a great contribution of lasting value to the study of Scottish constitutional history.

Professor Mackie's introduction offers some useful comment and adequately fills in the background.

The make-up of the volume is attractive, but there are too many misprints, mostly in the second part.

Volume XI. The original *Regiam Majestatem* was a legal text-book compiled by an unknown scholar of the early thirteenth century; but the *Regiam* now printed is based on a text published by Skene in 1609. The chief source of the *Regiam* is Glanvill: there is too an admixture of Roman and Canon Law. It has been much disputed whether or not the *Regiam* was an authentic statement of Scots Law, but, as Lord Cooper points out, 'even if it were true that not a sentence of the *Regiam* accurately portrayed Scottish practice, the book's prescriptive title to be treated as a foundation source of our system would be amply vouched by the *communis error* of five hundred years'.

Quoniam Attachiamenta is ascribed to the century 1286–1386. A large part of the original was concerned with proceedings in the ordinary feudal court. There are also discussed the duties of suitors and judge, and the conduct of proceedings in court. Skene's text nearly doubled the size of the original by the addition of miscellaneous material largely drawn from early statutes.

The introduction will repay study, particularly those parts which

cover the origin and sources of *Regiam Majestatem*. The Stair Society owes much to Lord Cooper for the time and skill which he has devoted. The textual notes are of value, and the translations acceptable.

These volumes are available only to members of the Stair Society.

D. I. C. A-C.

The Law of Negligence. Second edition. By J. CHARLESWORTH, LL.D., of Lincoln's Inn, Barrister-at-Law, Recorder of Scarborough [London: Sweet & Maxwell, Ltd. 1947. lxxxviii and 661 pp. 70s. net].

IN reviewing the first edition of this work, we had no hesitation in predicting succeeding and equally successful editions of it. It is of great assistance to all lawyers, whether practitioners, teachers or researchers, and it is all the more valuable because it investigates negligence in the law of contract and criminal law as well as in the law of tort. Of course its widest domain is in the law of tort and Dr. Charlesworth has taken full account of its links with other branches of that topic, such as the rule in *Rylands v. Fletcher*, nuisance, dangerous premises and chattels, the law of master and servant, and defences like *volenti non fit injuria*, inevitable accident and the act of God. Indeed, his chapters on several of these subjects might well be embodied in a treatise on the law of tort in general. As he observes in his Preface to this new edition, there have been considerable developments in this branch of the law since the date of the first edition (1938). He has incorporated some 350 additional cases and also a new chapter on 'Contracting out of Liability for Negligence'. Of course there is an examination of the Law Reform (Contributory Negligence) Act, 1945, and the effect of it is well summarised. We have suggested elsewhere that if the decisive cause of the injury to the plaintiff was his contributory negligence, the Act has not affected the Common Law rule that the plaintiff cannot recover, despite his proof of some negligence on the part of the defendant; and this seems to be the view adopted by Dr. Charlesworth (p. 492).

Among the cases added to this edition, one naturally looks for an opinion expressed as to *Searle v. Wallbank*, [1947] A.C. 341, where the House of Lords held that there is no duty on a landowner to fence his land adjoining the highway, or to keep an existing fence in repair, so as to prevent his cattle from straying to the highway and injuring persons or property there. Dr. Charlesworth points out the differences of judicial opinions in other cases which preceded this decision. Our own impression is that there may be circumstances which might make the cattle-owner liable for nuisance, if not for negligence; *e.g.*, if he knows of the existence of a gap in his fence and of habitual straying by his cattle through the

gap to the highway, and he nevertheless takes no steps to repair the gap; if their straying causes injury to persons or their property on the highway, surely he ought to be liable for nuisance.

In another decision of the House of Lords, *Read v. Lyons & Co., Ltd.*, [1947] A.C. 156, a mist of doubts was raised by *obiter dicta* on some of the points hitherto regarded as inherent in the rule in *Rylands v. Fletcher*. One of these doubts was whether the rule applies to injury to the person as well as to injury to property; we agree with Dr. Charlesworth that there seems to be no principle which limits the rule to injury to property, and there are in fact two earlier decisions in which it was applied to injury to the person.

The publishers announce that this edition will, 'during its effective life', be kept up to date by means of periodic cumulative supplements for which a pocket is provided in the back cover. This is good news in view of the Crown Proceedings Act, 1947, and the probable acceptance by Parliament of the Bill before it which provides for the abolition of the doctrine of Common Employment.

P. H. W.

Jenks' English Civil Law. Fourth edition. By P. H. WINFIELD, LL.D. (Cantab) Hon.LL.D. (Harvard and Leeds), K.C., F.B.A., S. J. BAILEY, M.A., LL.M., T. ELLIS LEWIS, PH.D., B.A., LL.B., WILLIAM LATEY, M.B.E., ALAN S. ORR, O.B.E., M.A., TREVOR C. THOMAS, M.A., LL.B. [London: Butterworth & Co. (Publishers) Ltd. 1947. cclxxxiii and 1206 pp. and (index) 70 pp. 105s.].

To readers of this review the names of the editors on the title page will be sufficient evidence of the care and skill that has gone to the making of this edition. The reviewer must be forgiven for not including all their styles and titles, but to have done so in these days of paper shortage could scarcely be in the national interest in a review in *The Cambridge Law Journal*. Anyone with a knowledge of Professor Winfield's exact scholarship will not be surprised at the removal of certain blemishes which appeared in earlier editions and something a good deal more than bringing the matter up to date has been done.

The style of the book, which is a dogmatic statement of principle supported in footnotes by bare references to authorities, does not supply much scope for discussion. It is in the notes sometimes appended to these 'titles' of the Digest that more detailed accounts of the law occur. It is one of the peculiarities of the work that it is not always easy to guess whether such a note will exist or the extent to which it will go. For example, to the title on Deceit there is a gem of a note dealing with the history of the action on Deceit. We regret but cannot explain the absence of a similar note for Negligence. At the same time in two volumes, much of

which is in large print, designed to cover the Civil Law of England the question is essentially one of selection. In our view no two authors or editors could be expected to agree on all details. To the natural difficulty of this is added the further problem of modern legislation that is largely administrative but, in fact, also touches private rights. When this work was first planned some thirty or forty years ago the mass of this legislation was much smaller and less important. It is, therefore, natural as well as probably right that it should not figure largely. For example, breach of a statutory duty is dealt with in two paragraphs under general principles of tort, where specific statutes are not dealt with, and there is no extension of the subject under employer's liability when the Employers' Liability Act alone receives full treatment. If we had any criticism on the proportions allotted to different topics we should be inclined to the view that the Land Law occupies too much space, but this is an 'inherited characteristic' from earlier editions. Incidentally the labour that has gone to the revision of this section of the work has been great and most beneficial. To those students of the land law who have only heard of registration of title we would like to commend to their attention the new Note on this subject (pp. 708-712) for its crystal clarity and simplicity. We know of nothing which gives a clearer picture of first principles.

In our view the great value of this book to students and lawyers lies in its juristic summary of the effect of numerous authorities. It enables them to get a firm grasp of the principle and comes rather at the end of study than at the beginning. Nearly thirty years ago a very learned lawyer, now alas dead, remarked to this reviewer: 'I give full marks to Jenks for the Digest'. If he were alive today we think he would have given full marks plus to this edition.

H. POTTER.

Annual Digest and Reports of Public International Law Cases, 1919-1942 (Supplementary Volume) including Consolidated Index and Tables of Cases for the years 1919-1942. Edited by H. LAUTERPACHT [London: Butterworth & Co. (Publishers) Ltd. 1947. xxvi and 550 pp. 55s.].

THE publication of a new volume of the *Annual Digest* has come to be regarded almost as a festive occasion for international lawyers. In view of an unwarranted recent proposal to regard the tributes bestowed on this work as said and, 'for a change, . . . to look more critically at this collective effort' (Schwarzenberger, 60 (1947), Harv. L.R. 565), it should be repeated with special emphasis that Professor Lauterpacht deserves and is assured of unqualified gratitude for the great work which, in these difficult times, he is pursuing with such energy and success.

The present volume falls into two parts. In the first place 171 cases are reported which were decided between 1919 and 1942 but, for one reason or the other, were omitted from the earlier volumes. Hence this volume which, incidentally, contains only one case decided by an international tribunal (No. 92), reflects the varied events which during the period in question raised manifold problems of international law: there is an English case relating to the date of the declaration of peace between Great Britain and Germany after the First World War (No. 147); a Dutch decision by which the accused was found guilty of having insulted Adolf Hitler (No. 5); another Dutch case which allowed extraterritorial operation to German legislation for 'the protection of German blood' (No. 11); numerous decisions throwing light on the Nazi policy of spoliation (Nos. 8, 9, 12, 14, 57); some decisions showing the degeneration which overcame German courts during the Nazi régime (Nos. 115, 172); the extraordinary decision of an American court according to which an administratrix appointed by a Mexican court cannot maintain an action so long as the U.S. Government does not recognise the Mexican Government (No. 38); many cases arising out of the expropriation of Mexican oil companies (*e.g.*, No. 7); others arising out of the Spanish Civil War; an unreported decision of Cassels, J., who expressly held that English courts had jurisdiction in respect of a crime committed within the lines of a camp of the Czechoslovakian armed forces stationed here (No. 85); decisions of the courts of France, Holland and other occupied countries which disclose the struggle with unprecedented constitutional problems (No. 161) or a considerable amount of courage on the part of judges (Nos. 133, 164, 166).

The second part of the volume for which Mrs. Gladys Lyons is responsible contains Consolidated Tables of Cases reported between 1919 and 1942, both alphabetical and according to courts and countries, and of cases cited, as well as a Consolidated Index. As Professor Lauterpacht says in the Preface, this is indeed 'a useful tool in handling what, by general consent, is becoming an indispensable instrument of work and reference in the field of study and practice of international law'.

F. A. MANN.

International Law, Vol. 1—Peace. By L. OPPENHEIM. Sixth edition by H. LAUTERPACHT, M.A., LL.D. [London: Longmans, Green & Co. 1947. liii and 902 and (index) 38 pp. 70s.].

TEN years have elapsed since the previous edition of Oppenheim appeared, and the law of nations has been passing through a crisis from which it has not yet emerged. In addition to many developments in the law, there have gradually accumulated more literature and a body of case-law. As a result the editor has substantially

revised and rewritten large portions of the book. Such recent developments as the Chicago Air Agreements and the question of the protection by international action of the Rights of Man are dealt with fully, and with the usual exhaustive bibliography. Most interesting, too, are Professor Lauterpacht's new sections on the principles of international organisation, and on the Charter of the United Nations where a difficult and verbose document has been treated with masterly compression.

The arrival of the sixth edition of Volume 1 is a boon to all concerned with the study of international law, from the student making his first steps to the specialist, and will be warmly welcomed by them. It is distressing, however, that the price of this 'thesaurus' of learning (already substantial in pre-war days) should be so high.

J. M. JONES.

Full Powers and Ratification. A study in the development of treaty-making procedure. By J. MERVYN JONES, M.A., LL.B. Cambridge Studies in International and Comparative Law, vol. 2 [Cambridge: University Press. 1946. xv and 182 pp. 12s. 6d. net].

INTERNATIONAL Law, like all other branches of law, reaches its highest field of development when called upon to deal with technical problems rather than with problems of policy. International lawyers, like all lawyers, are at their best when confronted with problems which call for juridical rather than political analysis. Mr. Mervyn Jones has chosen a technical question of international law and has brought to his subject all the skill of an experienced lawyer and the historical perspective of a scholar. The result is a detailed examination of the development and structure of the law and practice of full powers and ratification from the 16th century to the present day. It establishes that full powers were originally regarded as creating a mandate under which an agent could sign public contracts binding on his master, and that ratification merely confirmed these powers. On the other hand, present-day full powers are merely evidence of the agent's power to treat, while ratification represents the stage in which the draft or project is rendered binding. This development led to changes in the form, method and effect of ratification, which are examined in detail. Constitutional limitations on the treaty-making power and the modern practice of inter-governmental and inter-departmental agreements are discussed in separate chapters.

But this is not merely a work of legal analysis. Its bearing upon the study of international law as a legal system lies in the fact that it shows how international law, when it freed itself at the end of the 18th century from the influence of patrimonial

concepts of municipal law, came under the equally effective control of another branch of municipal law, namely, constitutional law. The former, in the form of *ratio scripta*, made international law; the latter, in the form of positivism, may well have become its undoing.

K. L.

A Manual of International Law. By GEORG SCHWARZENBERGER
[London : Stevens & Sons, 1947. 1 and 428 pp. 25s. net].

THIS book is an abridgment of Dr. Schwarzenberger's *International Law as Applied by International Courts and Tribunals*, designed for students. It consists principally in an essay of medium length—150 pages—on the Law of Peace, and in a series of Study Outlines of somewhat greater length. There are in addition a Glossary of Terms and two Appendices, one of which reproduces the Charter of the United Nations, together with the Statute of the International Court of Justice and an account of the membership of the principal organs of the United Nations. The whole is dedicated to Dr. H. A. Smith, who, incidentally, contributes an interesting drawing showing the operation of the Double-Radius Rule and whose recent retirement from the Chair of International Law in the University of London affords an occasion, which Dr. Schwarzenberger has most gracefully availed himself of, for paying tribute to his profound mastery of the Law of Nations.

It is thought that the learned author's essay is somewhat too difficult for beginners in the subject it treats, as it is full of inhorn terms which, despite the Glossary, are liable to confuse. The same essay possesses, however, considerable interest for the more advanced student as in it, and in his Introduction, Dr. Schwarzenberger carries further the explanation and justification of his chosen methodology which he recently contributed to the *Harvard Law Review*. The lack of a comprehensive explanation of its arrangement, which to some extent made his larger work difficult to read, is thus now supplied. Particular attention may be drawn to Dr. Schwarzenberger's views on the authority of international judicial pronouncements (p. 16 of the work under review) and of the writings of publicists (pp. 18–19).

The study outlines comprise a number of problems or questions designed to be solved or considered after a reading of each of the chapters into which the preliminary essay is divided. Each question has appended to it a very full bibliography and the whole series provides an extraordinarily comprehensive syllabus of the Law of Peace. In an Introductory Note Dr. Schwarzenberger is careful to define the purposes for which he has designed the study outlines, and to admit that they contain much more material than is required by beginners. He suggests that even if students should

have time to think over the questions alone this should be helpful —‘for insight into any subject depends more on asking the “right” sort of questions than on anything else’ (p. 158). There is much force in this, and though one’s first impression—despite the learned author’s warnings—must inevitably be that the very full and detailed Study Outlines marry ill with an essay the dimensions of which necessarily involve the very broadest treatment of the whole subject, it is to be seen that the book may be of very considerable use to the teacher. It would be interesting to see it employed in the manner Dr. Schwarzenberger recommends in connection with the courses in international law commonly offered in schools of political science.

C. P.

Studies in Biblical Law. By DAVID DAUBE [Cambridge University Press. 1947. viii and 328 pp. 21s.].

IN this volume Dr. Daube has brought together five studies in the comparative history of law. The main interest is focussed on ancient Hebrew and Roman law; but account is regularly taken of other Oriental and European codes. The topics dealt with include the origin and growth of legal ideas, the methods of formulating and amending ancient laws, the use and abuse of strict legal form, as well as a large number of legal concepts, for example, *custodia*, *locatio conductio*, *talio*, *vestigii minatio*, and the definitions of theft in Roman law. There is no question that the treatment sheds new light on many passages in the Bible and gives new meaning to many of the events of Hebrew history and many of the provisions of Hebrew law.

To the Biblical student special interest attaches to Dr. Daube’s contention that Hebrew law does not spring from Hebrew religion. Here he is in line with good modern critical opinion regarding the growth of Hebrew culture and civilisation as a whole. It is increasingly clear that what is portrayed in the Bible is the interaction of religious faith and historic event over the whole range of human life and experience; and it is equally clear that legal problems and their solutions are involved in the process. Another topic of the highest importance is that treated in Chapter 4 on Communal Responsibility. This is closely related to the investigations which have been actively pursued in recent years into the Semitic conception of the community and of the relation of the individual to the community, and more particularly into the idea of ‘corporate personality’ among the Hebrews. Dr. Daube’s treatment of communal and individual responsibility and of the transition from the one to the other is a substantial contribution from the legal standpoint to the solution of a problem that has been steadily growing in importance and urgency; and those who have profited

by the labours of Pedersen, Wheeler Robinson, and Eichrodt, will find new, relevant, and valuable material here.

It is for experts on Roman law to say how far Dr. Daube's book is *ex oriente lux* on their subject. There is no doubt about its usefulness to students of the Bible.

T. W. MANSON.

Federal Administrative Procedure Act and the Administrative Agencies, with Notes and Institute Proceedings. Edited by GEORGE WARREN, with Introduction by DEAN ARTHUR T. VANDERBILT, New York School of Law Institute. Proceedings. Vol. 7. 1947. viii and 630 pp. \$7.50.

It is not often that legislation of Congress attracts attention in legal circles here. But the Act which is the cause of this volume of studies merits serious consideration. The main provisions of the Act have been described by Dr. B. Schwartz, of Downing College, now a lecturer at his old University of New York, in an article in the *Law Quarterly Review*, January, 1947, to which reference should be made. The method adopted in this volume is to give in the form of individual contributions the history, background and probable impact of the Act, together with its application to the principal federal administrative agencies. The last 100 pages on rule-making, adjudication and judicial review are particularly relevant to current problems here.

The enactment owes its origin to the lawyers' reaction to the New Deal. It is as if our Bar Council and the Council of the Law Society had combined to work out the impact of our post-war legislation, their labours bearing fruit in a Bill to improve the safeguards for controlling the exercise of powers of delegated legislation and general administration, especially in the field of adjudication. There is no doubt that it was the persistency of the special committee of the American Bar Association, reflecting the concern of the Bar at the uncontrolled expansion of administrative power, which caused the Act to be put on the statute book. The precedent is worth the attention of our professional councils without delay; for the task, if undertaken, is a long one.

It is too early to pass any judgment on the results of this legislation. The similarity of the problems which it tackles to our own are easy to appreciate by a glance at the sub-titles printed with the Act—public information—rule-making—adjudication—judicial review; ancillary matters include the right of representation by counsel before any agency; under 'hearing' are to be found standards prescribed which should satisfy the most ardent advocate of the judicial process; examiners (*anglice* inspectors presiding at public inquiries) are elevated to a position of judicial independence within the organisation of the agency.

The Act is, in short, a challenge to the legal profession here to embark in earnest upon a constructive approach to the problems of administrative law.

E. C. S. W.

Administrative Law: Cases and Comments. Second edition. By
WALTER GELLHORN [Brooklyn: The Foundation Press, Inc.
1947. lxxxix and 1138 pp. \$7.50].

THIS is the second edition of one of the leading casebooks on American and administrative law. In the words of the editor, this edition 'substantially follows the pattern of the first, with revisions and additions to reflect the latest legislative and judicial attitudes towards administrative proceedings'. Except for the addition of some new material, there has in fact been little change from the 1940 edition (aside from the inclusion of a chapter on the application of the doctrine of *res judicata* to administrative proceedings), and, as such, this book has both the virtues and defects of the earlier edition. Chief among the former is the fact that Professor Gellhorn is not content with merely printing the relevant cases in the field; there is also much descriptive and explanatory material, both from the writings of others and in the editor's own words. The value of these are, however, somewhat discounted by an all too obvious bias in favour of the administrative as against the judicial process. No one denies Professor Gellhorn the right to his viewpoint on the subject; there are few, if any, unbiased writers in the field on either side of the Atlantic. One may at the same time venture to doubt whether an extreme presentation of one side of the case is the best approach for a casebook intended to serve as an introductory guide to the law student in so controversial a field. The danger here is, if anything, increased by the great skill with which Professor Gellhorn presents his extreme view, without at the same time indicating that there is a strong case on the other side.

One point should be made for the benefit of the English reader. An American casebook in this field can be of value only to one who has a certain understanding of American constitutional law as well as some idea of the structure of the federal administrative process. It is true that such casebooks are written for the law student entering upon the subject; but it must be remembered that the course on administrative law is normally given toward the end of the American law school curriculum so that the student should already have the required constitutional background. The interested reader in this country can, however, acquire the necessary basis with the aid of the adequate bibliography Professor Gellhorn has prepared—although, here too, the works cited preponderate in favour of the editor's point of view.

B. SCHWARTZ.

Criminal Justice and Social Reconstruction. By HERMANN MANNHEIM, DR.JUR., Lecturer in Criminology in the University of London [London: Kegan Paul, Trench, Trubner & Co. 1946. viii and 290 pp. 15s.].

DR. MANNHEIM starts by pointing out that this country in recent years has paid a great deal of attention to the treatment of offenders but very little to the content of the criminal law. His thesis is that there is a 'crisis in values' and that this calls for a reconstruction of the criminal law. To review criminal law in this way calls for great knowledge of the law and of the society that it serves. Dr. Mannheim realises this, and in the preface to his book *Social Aspects of Crime in England between the Wars*, published in 1940, he tells us that he 'had to make himself familiar not only with the crime situation and the penal situation of this country, but also with its whole social structure and the administration of the social services'. Dr. Mannheim has worked very hard, but as might be expected his judgments are sometimes based on an insufficient examination of the material. For instance, lawyers are well aware of the difficulties that arise over criminal negligence, but the author's discussion at pp. 55-59 may not be thought helpful, whilst the reference at p. 56 to English law 'adhering as it does, up to the present day, to the medieval doctrine of "constructive murder"' is not correct. At p. 90 there is a presumption that cyclists do not have special protection from the law because they are persons of no account in present day life, whereas every minister knows that cyclists are an important 'interest'. On p. 240 the author thinks that the advisory functions of justices' clerks and the fact that their office is held at pleasure are factors that work against good men taking that office. An appointment as justices' clerk is in fact regarded as being as safe as the established civil service, where the terms of office are also at pleasure. Taking things at their face value leads over and over again to facile deductions.

Whether, apart from the things I have mentioned, this can be regarded as a valuable book depends on the reader's ideas of what are important matters for criminal law. Thus I find little interest in some fifty pages that include Extermination of Socially Useless Lives, Sterilisation and Birth Control. In my undergraduate days we used to talk about birth control as a Problem, to discover later that the problems are hardly legal. The same thing arises over what the author calls 'economic crime'. At p. 118 he refers to 'the problem, which is so burning in capitalist or semi-capitalist communities, of how to deal with the private owner who wilfully destroys or damages his own property'. Perhaps the evil is more one of failure to use or make good use of property, and the best remedies may be administrative. We requisition empty houses and try to insist on a tolerable standard of farming; the effective sanction

is the administrative action of the local authority or the county agricultural committee. Criminal law is not the only law to invoke, and law is not the only way of dealing with anti-social behaviour.

Dr. Mannheim has tried to do a difficult thing, and if he has ruffled the feathers of lawyers that is all to the good. But I must enter one plea for my kind: we do know quite a lot about our own subject, and we hate easy explanations of what we know is complicated.

R. M. J.

Law of Property in Land. Third edition. By H. GIBSON RIVINGTON, M.A.(OXON), Solicitor [London: Law Notes Publishing Offices. 1946. xxiv and 556 pp. £1 5s.].

THIS admirable textbook on the Law of Property retains its original purpose. Mr. Rivington's preface reminds us that it was written for those law students who, having already studied the subject for some previous examination, desire to revive their knowledge as a prelude to the study of Conveyancing for the Final Examination of the Law Society. It thus assumes that the reader is already acquainted with the outlines and background of the subject.

Experience has shown, however, that this book has special value for a university student at an even earlier stage. When he has covered the standard textbook, has acquired a reasonably good knowledge of the subject and is beginning, perhaps, to feel somewhat overburdened with detail, he will find refreshment in this book. It is clearly written. It is concise. It emphasises the practical aspects of the subject. It will help him to see clearly both the structure which underlies the detail of his studies and much of the detail also. It is not, and is not intended to be, sufficient for all his purposes. Yet, if used in the manner suggested it has a very real value. A notable example is Chapter 3, 'The Various Estate Owners', which brings into true perspective the machinery introduced by the Property Acts for settlements, alienation and devolution of land.

S. J. B.

Real Covenants and Other Interests which Run with Land. Second edition. By CHARLES E. CLARK, United States Circuit Judge, Second Circuit; formerly Dean of the School of Law, Yale University [Chicago: Callaghan & Co. 1947. lv and 281 pp. and (Index) 28 pp. (No price stated.)].

SIR WILLIAM HOLDSWORTH regarded the first edition of this book as 'a stimulating book upon a very difficult subject' which helped the English lawyer to look at the rules of English law from a critical point of view: (1930), 46 L.Q.R. 364, 365; and in a full review of the present edition, Professor William H. Farnham said

that the book 'ranks with the greater legal works of our time': (1947), 33 Cornell L.Q. 153 at 161. Valuable though the comprehensive American legal mammoths are, it is a refreshing change to find a collection of relatively slender essays (albeit well supported by authorities) which concentrate on the difficulties. The greater part of the book is devoted to Licenses and the Running of Easements and Profits and of Real Covenants; these occupy 132 out of the 205 pages of text. An Introduction, Party-Wall Agreements as Real Covenants, the Running of Equitable Restrictions, and of Rents, and the Legislative Restriction of Running Interests fill the remaining pages, with 76 pages of Polemical Appendices attacking the American Law Institute's Restatement of the Law of Real Covenants with a fervour reminiscent of the words of Coke, C.J., in *Blamford v. Blamford* (1615), 3 Bulstr. 98 at 108 ('*Maledicta expositio quae corrodit viscera voluntatis*'). Throughout, much attention is paid to the policy of the law and in particular the objective of freedom from obstacles to alienation.

Although it is essentially a book on American law, it is full of English authorities, both ancient and modern. One or two familiar friends, indeed, are missing, e.g., *Clore v. Theatrical Properties, Ltd.*, [1936] 3 All E.R. 483, *Minister of Health v. Bellotti*, [1944] K.B. 298, and *Millenium Productions, Ltd. v. Winter Garden Theatre (London), Ltd.*, [1946] 1 All E.R. 678 (consider, e.g., at p. 680, and cf. p. 49 of this book). *Re Hunter's Lease*, [1942] Ch. 124, is not without interest to p. 98, n. 18, and so far as English law is concerned, it is perhaps not quite fair to support the argument that an option to purchase contained in a lease should run with the land, by the statement that no question is made about the running of a covenant to renew a lease (p. 100, n. 21), without citing the views of Romer, L.J., in *Woodall v. Clifton*, [1905] 2 Ch. 257 at 279 that this is an anomaly which it is too late to question though difficult to justify. And there are a few slips, e.g., 'L.R. 3 Eq. 306' for 'L.R. 3 Ch. 306' (p. 68, n. 12), 'Elvit' for 'Elvet' (p. 132, n. 18) and the premature elevation of Phillimore, L.J., to the peerage (p. 52, n. 120).

Throughout the book there are flashes of interest and humour on many diverse topics, ranging from questions such as the existence in America of easements in gross (with a consequent confusion with licences) and the American view of privity of estate, to matters such as a tantalising reference to 'a conflict whether rolling stock [on a railway] is realty or personalty' (p. 51), a description of Lord Kenyon, C.J., as 'a dull and reactionary judge' (p. 279), and speculations on the cost of the Restatement and the salaries, honoraria and expenses of the Reporter and his Advisers (p. 208). Judge Clark's chosen subject is indeed difficult, and not even his clarity of exposition can make it simple; but he is uniformly rewarding and never dull.

R. E. MEGARRY.

Cases on Wills and Administration. Third edition. Selected and edited by PHILIP MECHEM, Professor of Law, University of Iowa, and THOMAS E. ATKINSON, Professor of Law, New York University [Brooklyn: The Foundation Press, Inc. 1947. xv and 782 pp. \$7.50].

THIS substantial volume is one of thirty-six case books comprised in the University Casebook series, published under the auspices of a distinguished editorial board of deans and professors of American law schools. The volume is designed both as a source book and as the basis of a course of study. After an Introduction, containing passages from works on economics and other non-legal subjects to show conflicting theories as to the desirability of allowing succession to property, each of the main topics concerned in intestacy, wills, probate and administration is treated separately, with introductory comment, extracts from selected cases and explanatory notes indicating where further information may be found. Not infrequently an English case is included and occasionally an English statute such as the Statute of Frauds or the Wills Act. Most of the cases, of course, are from the various jurisdictions in the United States. There the law may vary from State to State, in consequence of statutory changes or of diverging developments from the common law. Such books as these, accordingly, have a special value both for the law student there and for those of us in this country who wish to learn something of a legal system so closely related to our own.

S. J. B.

The New Law of Education. Second edition. By Miss M. M. WELLS, M.A., of Gray's Inn, Barrister-at-Law, and P. S. TAYLOR, M.A., Chief Education Officer, County Borough of Reading [London: Butterworth & Co. (Publishers) Ltd. 1947. xx and 552 pp. and (index) 55 pp. 21s. net].

THIS is the second edition of a book written by Beattie and Taylor in 1944. That book aimed at a clear exposition of the Education Act, 1944, and its relation to the old law. The present edition follows the general lines of the earlier work and includes amendments made by the Education Act, 1946, and the Statutory Rules and Orders arising out of those Acts. It is divided into four parts.

Part I reviews the history of compulsory education in England and Wales and describes the new system resulting from the Education Acts. This part is of great value to the student of social history in addition to those engaged in administrative work in education, but the section dealing with the transition from the old to the new system might, with advantage, have been

expanded and introduced immediately after the general outline and before the new statutory system of education is discussed in detail.

Part II gives the annotated texts of the 1944 and 1946 Acts and incorporates the amendments made by the 1946 Act in the text of the 1944 Act. The notes are full and clear.

Part III includes all Statutory Rules and Orders of general application made and in force on July 31, 1946. The authors point out in the preface to the second edition that the duty is now imposed on the Minister of Education to secure the effective execution of a national education policy. This means that in addition to the large number of circulars and administrative memoranda issued by the Ministry of Education for the guidance of education authorities, there are now added the Statutory Rules and Orders by which the Minister exercises his executive power. The authors give a list of thirty-seven such orders issued up to July, 1946. Some of these are indeed statutes in form as well as in effect, for example, the Regulations prescribing standards for school premises (S. R. & O., 1945, No. 345) are divided into seven parts comprising forty-five Regulations and three Schedules. Legislation by Statutory Rules and Orders on this scale makes the task of authors of books such as this exceedingly difficult, particularly when there are long delays between completion and publication. The insertion of blank pages for the reader to keep these lists up to date would be an advantage.

Part IV consists of a selection of circulars and memoranda. Although such a selection may be useful to the general student, it has very limited value to anyone using the book for the purposes of reference. For this purpose, the complete list of circulars must be available and here again, blank pages would be helpful.

The Education Act, 1944, was the first of the group of social legislation which includes the National Insurance Act, the National Health Service Act, and the Bill to abolish the Poor Law now before Parliament. All these statutes will require for their implementation Statutory Rules and Orders together with circulars and memoranda of guidance. All depend to a greater or lesser extent on the county and county borough councils for local administration. The burden on the major local authorities is, therefore, a heavy one, but the system of divisional administration envisaged in the Education Act of 1944, with its complex relationship between the local education authority and the divisional executive, has not proved to be a successful working model for similar schemes under, for example, the National Health Service Act. Again, the recommendations of the Local Government Boundary Commission may alter very considerably the existing pattern of county and county boroughs. The practical direction of a national scheme of compulsory education must, therefore, like the other social measures, be subject to changes to meet local circumstances, and for this reason

a book, such as the present one, cannot attempt to be comprehensive. Nevertheless, it does fulfil its purpose and gives those concerned with the administration of the educational services a clear picture of the framework set up by the Education Acts. In this it is aided by an excellent index, the headings of which could, with advantage, be followed by those whose duty it is to keep abreast of the stream of publications issuing from Government Departments as a result of this and allied legislation.

A. LESLIE BANKS.

Monopolies and Patents. HAROLD G. FOX [University of Toronto Press. 1947. xxv and 308 and (Appendices, Index, etc.) 80 pp. \$10].

Inventions, Patents and Monopoly. P. MEINHARDT [Stevens & Sons, Ltd. 1947. xvi and 334 and (index, etc.) 18 pp. 25s. net].

BOTH these books are intended for a non-specialist public; both lead up to proposals for the reform of patent law. There the resemblance ends.

Dr. Fox gives two-thirds of his space to the history of patents of monopoly in general and patents for inventions in particular. Those interested in the economic history of sixteenth and seventeenth century England should find this book worth reading for its historical part alone. But Dr. Fox is not a historian and has set out to prepare a brief rather than to write a history. His brief is skilfully prepared: his language is precise yet suited to lay readers, while the authority he cites is sufficient by professional standards. His purpose is to protest against a tendency of Canadian and American courts to hold patents invalid for not disclosing a sufficient step of invention, and especially against the view that invention involves something equivalent to a 'flash of genius'. I think he makes his point: this tendency is wrong: but I do not believe it is as important as Dr. Fox contends. The English patent system is as unsatisfactory as the Canadian and American, though Dr. Fox's problem does not trouble us here. (So I suspect is the French which Dr. Fox considers perfect.) In England, only in extreme cases is a patent held invalid for total absence of invention; the English patentee fails, regularly, for another reason: his specification is wrongly worded.

The first half of Mr. Meinhardt's book is a general survey of patent law and practice and of related legal topics; written for business men, it contains too much procedural detail and legal phraseology for the general reader while its form is unsuited to professional use. Next comes a short, rather abstract section on abuse of patent monopoly; the unimportance of patents as a cause of industrial monopoly is sufficiently demonstrated. The rest of the book deals with reform of patent law.

Mr. Meinhardt's proposals range from the reform of *stare decisis* to the reform of the seal on the patent grant. Chief among them is a proposal to confine patent monopolies (as distinct from rights to claim royalties) to inventions involving a 'major inventive step'. Thus Mr. Meinhardt would introduce into English law the very trouble that Dr. Fox has shown to be so serious in Canada. Nor would that proposal touch the real problem, which is this: If an invention is really important commercially, it will pay competitors to defend a patent action rather than do without the invention; and it is not commercially practicable to draft patent specifications that will stand attack in the courts.

By way of analogy, suppose the following rules as to wills. First, wills must be made at the age of twenty-one and not subsequently altered except by deletion of entire paragraphs. Second, if any will, strictly construed, fails in any particular to carry out the intentions the testator would have had, if the will had been made on his deathbed, that will shall be void. Third, the Crown shall take the whole estate on an intestacy. A first-class conveyancer might draft a valid will; nobody else would except by luck. Yet that is roughly a patentee's position today.

There are two natural remedies: Mr. Meinhardt wants both. The less promising is to abandon rules of construction in favour of patentees; the more promising to allow wide powers of amendment of specifications. The recent Departmental Committee rejected both these proposals, offering none of its own.

Dr. Fox's book suggests another line of thought. It cannot be a coincidence that for what appear to be quite different reasons, Canadian and American patents also are habitually found invalid. It seems only too likely that the problem is insoluble: that the system of patent monopolies is unsuited to the conditions of modern commerce. Yet it still seems true that only the hope of a patent monopoly justifies much of the present expenditure on industrial research and development.

T. A. BLANCO WHITE.

Income Tax Case Law. Judicial Interpretation of the Income Tax Acts. By A. FARNSWORTH, PH.D., LL.M. [London: Stevens & Sons, Ltd. 1947. 176 pp. 17s. 6d. net].

VISCOUNT SIMON in his foreword explains that 'the learned author of this work . . . is now seeking to set out the principles lying behind the main decisions which have been given by way of interpretation of our Income Tax Code'. In order to do so the author has in some ten chapters dealt with such diverse subjects as, (1) the Income Tax Act, 1842. (2) Fact or law in cases stated. (3) Domicile of choice, fact or law. (4) The residence and domicile of corporations. (5) What amounts to carrying on business by a

foreign corporation. (6) The legal evasion of surtax. (7) Double taxation of foreign dividends. (8) Annuities paid 'free of income tax'. (9) Capitalised interest, and (10) Corporate dividends in American Law; and ably has the author achieved this aim.

All too often, however, the depressing conclusion is reached, that this or that conception is a question of fact for the commissioners—residence of foreign person, domicile of choice, what constitutes a trade, professions, charitable purposes only, capital expenditure, succession to a trade, money wholly and exclusively spent for the purposes of a trade, in effect, a good three-fourths of the book—and unfortunately once a conception has been shown to be a question of fact, the subject is often dismissed because 'reasons of space will allow for a review only of the most important cases', see *e.g.*, pp. 13, 20, 54.

It is difficult to see how the suggested 'course of conduct' test better answers the question fact or law, than does the judges' test of 'degree' pp. 60-1, especially when it is used to determine whether income is applied for charitable purposes only, and the charity concerned is governed by an instrument which has to be construed.

It is interesting to compare the cases that *Tolley* cites on Residence at p. 31 *et seq.*, on Adventure in the nature of a trade at pp. 52-3, on what constitutes a trading by a foreign corporation at pp. 34-5, with those in this book respectively at pp. 54-6, 81-3 and 126 *et seq.*

The book is, as Lord Simon points out, illuminating, but it has a somewhat limited value to the income tax lawyer who is often more concerned with what counsel in *Re Bischoffsheim*, [1947] W.N. 318 called the 'balance sheet of facts' which, when the account is taken, establishes a person's domicile, or residence, or that a trade is carried on.

For the student likewise the book is of limited value because, delightfully written and sound though it is, income tax is essentially a study of the Acts, and this book is in no way a guide to them.

R. L. STONE.

The Finance Act, 1947. By H. E. AMOS, of the Middle Temple, Barrister-at-Law, and FRANK ENGLAND, B.A., LL.B., Solicitor of the Supreme Court, formerly a Special Commissioner of Income Tax [London: Butterworth & Co. (Publishers) Ltd. 1947. 175 pp. 15s. net].

THE publishers are to be congratulated on the comparative speed with which they have produced this volume—a reprint from Butterworth's *Annotated Legislation Service*—for the public. Here, however, the cause for congratulation ceases.

The idea of publishing an annotated edition of a difficult and

important Act, is a good one; it is only in its execution that criticism is valid. The Act is both accurately and adequately cross-referenced; it is the explanation of it which suffers. If the Act is difficult, the explanation of parts—*e.g.*, Part IV dealing with profits tax which requires the greatest lucidity, because here the Act is most obscure—is more involved than the Act and less coherent than a reading of the sections.

Long quotations on pp. 16, 19, 23, 24, 26, 31, 36, 37, 38, 39, 41, 43–5, 48, 60, 62, 63, 67, 74, 91, 108, 122, 124, 127, 139, from Ministers of H.M. Government, which do not help in the interpretation of the Act at all, are included verbatim.

When, however, the editors come to explain the meaning of 'net relevant distributions' at p. 71, 'gross relevant distributions to proprietors' at p. 72, and 'franked investment income' at p. 82, we find in comparison the text of the Act clear and precise. Nor are the examples given as illustrations of the operation of the Act on pp. 65, 70–1, and 78 any less involved.

On p. 64 we are told that for the purposes of Profits Tax, profits are separately computed on income tax principles (*i.e.*, the principles applicable to the computation of profits under case I of Schedule D apply). No explanation is given to reconcile that statement and the provisions of section 35, which in effect deals with distributions on winding-up.

The index gives no reference to winding-up either under that name or under the heading 'Profits Tax'.

The effect of the important proviso to section 30 is not touched on at all.

Otherwise the commentary is adequate in dealing with the less difficult changes that have taken place concerning death duties, sections 49–51, stamp duties, sections 52–62, and income tax, sections 14–29. The value of this book lies in the cross-references which are given under each section and on this account should be useful to practitioners.

R. L. STONE.

Paget's Law of Banking. Fifth edition. By MAURICE MEGRAH, of Gray's Inn, Barrister-at-Law, Secretary of the Institute of Bankers [London: Butterworth & Co. (Publishers) Ltd. 1947. xlvii and 446 and (index) 50 pp. 25s. net].

WORKS of authority are frequently dull and too seldom readable. Paget is different, it has character and vigour as well as authority. A welcome change from excellent books containing innumerable cases and unexceptional but colourless statements of principle.

First published in 1904 when the *Gordon Case* was a new and hotly discussed decision, the controversy still smoulders in the pages of Paget; it is primarily concerned with practical difficulties, and may one express the hope that its characteristic approach may

be preserved in future editions, and that difficult and controversial decisions will not be relegated to footnotes and that ambiguous mark of distinction 'cf.'? Mr. Megrah has rightly continued the author's characteristic treatment.

The author has certain dislikes—post-dated cheques, impersonal payees such as 'cash', and the marking 'a/c payee'. The last seems to have approached the limits of his patience, for he confesses (p. 310) that he finds it difficult to write thereon with 'reticence'. It is impossible not to wish that we might have had his views on the recent cases which have extended the conception of banker's negligence.

The protection afforded to collecting bankers by section 82 of the Bills of Exchange Act, 1882, has become somewhat attenuated. Bankers can act in the ordinary course of business yet, apparently, be negligent at the same time (p. 166-7). The customer need have no care in the custody of his cheque book, and is allowed some foolishness in trusting subordinates (p. 273). The collecting banker, on the other hand, has nowadays to walk very warily indeed.

Not only have banks to make inquiries, of an uncertain range, when an account is opened; but they may also be concerned, to an uncertain extent, with the way in which an account is operated. The possibility that they may also be concerned with changes in a customer's employment is, at yet, a fitful mocking shadow, which may have substance as well.

When these duties are considered in conjunction with the possibility that the applicant may be married, so that the inquiries may strictly, on occasions, have to cover the spouse, there seems to be real justification for the doubts expressed by Mr. Megrah as to whether the section now gives any useful protection.

Banks have a very natural desire to be utterly careful. It is, therefore, to be regretted that they should require to be warned that, if they go beyond the strict limits of the present decisions, they may provide a basis for a further extension of their duties to the true owners of cheques.

One may agree, but only after some hesitation, that those who issue cheques which cannot be met, do so in order to gain time and not because they are dishonest—so that they are no more likely than others to pay in cheques which do not belong to them. On the other hand, one likes to think that banks are remote from such considerations as the possibility that accounts may be opened elsewhere, if inquiries are insisted upon when an account is opened and the prospective customer dislikes them.

The *Gordon Case* may stir uneasily, the comparative merits of being a collecting banker within section 82 on the one hand, and a holder for value, vulnerable to the forged indorsement, may call for a reflective pause—but 'the true position is that the *Gordon Case* was wrongly decided'.

A. W. MOTION.

Rayden on Divorce. Fourth edition. Special Supplement containing the Matrimonial Causes Rules, 1947. By F. C. OTTWAY, of the Probate and Divorce Registry [London: Butterworth & Co. 1947. vi and 51 pp. 6s.].

THIS is a reprint of the Rules with brief notes mainly directed to change or lack of change. There is no Index other than the preliminary table setting out of the Arrangement of Rules. The notes and cardboard covers may well be worth the price of 6s. charged for the Supplement, but it is suggested that an Index should be provided if there is no reference to the principal volume to which this is supplemental.

H. POTTER.

The Law of Support in Relation to Minerals. By F. A. ENEVER, M.C., M.A., LL.D., of Gray's Inn, Barrister-at-Law, Principal Assistant Solicitor Treasury Solicitor's Department, Recently Legal Adviser and Registrar to the Coal Commission [London: The Solicitors' Law Stationery Society, Ltd. 1947. xiv and 162 pp. 25s.].

THE price charged for this slim volume does not augur optimism on the part of the publishers with regard to the extent of its sales, but the mere recital of the learned author's qualifications shows that it would be difficult to find one more acquainted with this rather abstruse branch of learning. The learned author divides his work into three parts: I, Common Law, II, Statute Law, and III, Conclusions. The conclusions, which occupy about a sixth of the text, are not primarily legal as may be seen by the observation of the learned author in his preface, when he recommends that the layman should read this part first. This part is concerned with what the author regards as desirable reforms. Having regard to the fact that Part II deals with about twenty statutes this is also a comment on the state of our statute book in this connection. The trouble is that this subject deals with problems of a highly technical character in which the law is in large measure woven into the net of the land law, but the statutes are usually of a more or less commercial character. It is, therefore, deemed unnecessary to regard the symmetry of the existing law. This contempt for first principles is apt to bring its own revenge. A simple illustration is to be found in one of the most recent cases mentioned in the book: *Newcastle-under-Lyme v. Wolstanton* (1947), 63 T.L.R. 162, where the Court of Appeal overruled Evershed, J., on the point whether gas mains laid in land under statute were laid in respect of a sole right to occupy though there was no right of ownership, tenancy, or easement in or over the soil. It is thought that there would be no need for this kind of difficulty if only the right was expressed and limited by reason of the existing law, e.g., as an easement or

whatever other kind of right was intended to be created. Planning does include 'planned law'.

Part I of this work is an expression of our last sentence. The learned author has sought to express the Common Law of support in twelve Guiding Principles with two excursions on minerals under ex-copyhold lands and nature and incidents of the right of support. The Guiding Principles are set out with support from copious extracts from judgments and the facts of cases are very well extracted. We like this part of the book and think that anyone interested will find it helpful.

Part II does not attempt the same logical coherence. It deals with the matter statute by statute. This is probably the only way and certainly the most convenient. We commend this book to all interested in the land law as well as those having a more specialised interest.

H. POTTER.

English Legal Authors before Blackstone. By H. A. HOLLOND, Rouse Ball Professor in the University of Cambridge, Reader to the Council of Legal Education [London: Stevens & Sons, Ltd. 1947. 42 pp. 3s.].

THIS pamphlet reprinted from the Cambridge Law Journal should come into the hands of all law students and having come stay there. Its character is expressed by the learned author in his opening words: 'The following summary is based on notes compiled, like the common-place books of old, for personal use'. It contains those items of information about authors and books which any student should be glad to have and which seems to the writer to be rather lacking in the equipment of the average law student. We would express a hope that the learned author will pursue his method and bring it down to later times. When a book like *Williams on Real Property* is scarcely known by name to the modern student we think that Blackstone is too early a stopping place and we must follow the example of Oliver Twist. As the learned author remarks, selection is always a problem, and there are bound to be variations; we would like to have seen *Prynné's Animadversions*, *Noys Maxims*, to mention two, but this is not criticism and in this sort of work it is not possible or desirable to cover every man's taste. The point is that the student does not know enough about authors upon whom reliance is placed, even if he cannot be expected to read them all. He should be encouraged to know and we think this is the way to do it.

H. POTTER.

The English Legal System. Second edition. By G. R. Y. RADCLIFFE and GEOFFREY CROSS [London: Butterworth & Co. 1946. 432 pp. 21s.].

Radcliffe and Cross is established as the best students' book on the history of the courts, and it is good to see that a second edition

has appeared. There is nothing to indicate how much revision has been made in this edition; the Preface is a reprint of that to the original edition save for dates. A comparison of Chapter 18 in the two editions suggests that revision has not been very thorough, for the second edition repeats (p. 327) the error of saying that in appointing borough justices the recommendations are received from the *borough council*, and (at p. 344) it is still implied that all justices' clerks are solicitors. Some new matter has not been fitted in at all skilfully. At p. 334 the student learns that a criminal information 'may still be filed' by the master of the Crown Office, whilst on p. 335 he will read that criminal informations by the Master of the Crown Office are abolished. Doubtless when publishing conditions are easier the authors will remove these grounds for criticism.

R. M. J.

The Construction of Deeds and Statutes. Second edition. By Sir CHARLES E. ODGERS [London: Sweet & Maxwell, Ltd. 1946. xxi and 328 pp. 22s. 6d.].

Interpretation of Documents. Second edition. By Sir ROLAND BURROWS, K.C. [London: Butterworth & Co. 1946. lxxix and 121 pp. 12s. 6d.].

BOTH of these books have established their place as lesser works on Interpretation, and new editions are welcome. The genesis of works on Interpretation is that counsel when briefed have to say something, and they want books to give them ammunition. Go to 'Maxwell' and you have 132 pages for the Table of Cases cited; turn to the more modest dimensions of Sir R. Burrows' book and you have a Table of Cases that just fails to reach 70 pages. Give a lawyer half a dozen cases on one side, and with the aid of these books he ought to be able to find an equal weight of authority for an opposite conclusion. A serious attempt is made to reduce the chaos of precedent to an intelligible body of principles, but it is not entirely successful: the profession wants ammunition to be shot off in a barrage.

R. M. J.

Clarke Hall and Morrison on Children. Third edition. By A. C. L. MORRISON, assisted by L. G. BANWELL [London: Butterworth & Co. 1947. xxiii and 372 pp. 37s. 6d.].

ANYONE whose work requires reference to the law relating to children should have *Clarke Hall and Morrison*. It collects together

the statutes and the subordinate legislation and gives notes on them. The relevant Departmental Circulars are also given. One of the peculiar merits of this book is that it meets the need of the specialist and at the same time it is usable by the unlearned: the clerk of the court and the practitioner find in it what they want, whilst the student and the lay justice can find what they want. Take for instance the note at p. 123 on school attendance. There is nothing remarkable in that note, but it answers the general questions that do in fact get asked, whilst the following pages of statutes and notes fill in the detail. The authors are to be congratulated on their third edition and we must thank the publishers for a substantial binding, for a copy of *Clarke Hall and Morrison* gets carried to and from court and looked at whenever its fortunate possessor has to know the law.

R. M. J.

The Complete Law of Housing. Fourth edition. By H. A. HILL and D. P. KERRIGAN [London: Butterworth & Co. 1947. xlvii and 828 pp. 37s. 6d.].

THIS book follows the well-tried plan of giving brief introductory chapters followed by the text of the legislation with explanatory comment and the text of the important Departmental Circulars and Memoranda. This new edition is designed to state the law as it existed on December 1, 1946, and the authors have done it very well: it is not their fault that in some matters the book is out of date before it can be reviewed in this Journal. In a field where the legislature is active the writers of textbooks have to take a datum line, for if they wait for anticipated legislation they can never write at all. The Town and Country Planning Act, 1947, alters some of the law as stated in this book, but the effect of that Act depends on subordinate legislation to be made under it. This is of course a practitioners' book, but a student of constitutional law would profit from reading Chapter 3 on Inquiries.

R. M. J.

The Law of Employment. By ERIC SACHS, K.C. [London: Sir Isaac Pitman & Sons. 1947. ix and 65 pp. 6s.].

Statute Law Relating to Employment. Second edition. By F. N. BALL, LL.B. [London: Stevens & Sons. 1946. xii and 278 pp. 25s.].

THE law relating to employment has been so much changed by recent legislation that many people who ought to know about these

things are somewhat bewildered. Mr. Sachs, in publishing the Gresham lectures that he delivered in 1946, provides a very good introduction. His book gives the essential foundation of the subject, the contractual relation. On that we have a vast superstructure of legislation. Mr. Ball provides us with a convenient reference book to the statute law; it is more a book for works managers and secretaries than for lawyers, though a lawyer may find it handy for Mr. Ball has packed a remarkable amount into a book that is not unduly large.

R. M. J.

An Introduction to International Law. By J. C. STARKE, B.A., LL.B., B.C.L.(Oxon) [London: Butterworth & Co. 1947. xiv and 293 and (Index) 23 pp. 25s.].

THE purpose of the author of this work has been to write a 'short practical elementary textbook which will provide intending international officials, diplomatic recruits, and university students with the basic knowledge for coping with day to day problems of international law'. It is divided into five parts—International Law in General, States as subjects of International Law, Rights and Duties of States, International Transactions, Disputes, War, and Neutrality.

The book illustrates the difficulty of achieving that very desirable object—a single-volume textbook at a reasonable price which will meet the requirements of the readers mentioned by Mr. Starke. In the process of compression something has to be sacrificed. It is believed, for example, that it is not merely advantageous, but actually essential, to have in any textbook of this nature, some historical account of the origins of the subject, as otherwise the proper proportions of custom and the influence of writers, cannot be understood. Certainly more space should be devoted to the International Court of Justice than the two and a half pages given to it by Mr. Starke. The whole future of international law depends on the prestige and authority of tribunals similar to it. Something more might have been said about the work of the Permanent Court of International Justice, the extent to which the Optional Clause had been accepted, and a fuller account should be given of its important decisions. It is surely incorrect to say (as Mr. Starke does at p. 249) that 'it did not deal with any case of momentous importance, for instance one raising issues of peace or war, or vitally affecting the interests of any State or States'. The Mosul dispute, the case concerning the Austro-German Customs Union, and even, strangely enough, the Nationality Decrees in Tunis and Morocco all ultimately involved issues of this nature. The

delegation of international institutions (U.N.O. and I.L.O.) to an appendix is hard to justify.

Subject to these general qualifications, the book, although it cannot be said to 'fill a gap', should be useful.

J. M. JONES.

Grundlehren des Völkerrechts. By Dr. ERNST SAUER [Cologne: Balduin Pick Verlag. 1947. 336 pp.].

THOSE who know the present state of the law libraries in Germany, and the scarcity of textbooks, must acknowledge the handicap under which new German textbooks are written. At the same time it must be remembered that new works are read with eagerness, especially if they concern a topical matter, such as international law, and that nothing but the best is good enough for the uninstructed. Judged by this standard the little handbook cannot escape criticism, but it is an honest attempt to set out in little more than 300 small pages the entire law of war, peace and neutrality. The exposition is on the whole accurate and always sincere, but the method is theoretical rather than practical. Great reliance is placed on the opinions of writers, and very little upon the practice of States and the decisions of international courts and tribunals. Thus a system emerges which is mainly professorial and formalistic, and its normal operation remains obscure. This criticism applies, in particular, to chapters such as that on State responsibility. A second edition will benefit much if the theoretical considerations are curtailed, if some illustrations from decisions are inserted, and if the author finds an opportunity to incorporate the results of the research in international law which was carried out in countries other than Germany after 1933.

K. L.

The Statutory Criminal Law of Germany. With Comments. Prepared by VLADIMIR GSOVSKI, PH.D. Edited by ELDON R. JAMES. Washington Library of Congress, 1947.

THIS is an excellent edition and translation of the German Criminal Code of 1871, incorporating all amendments made between its enactment and the surrender of Germany. It is accompanied by chronological and systematic tables of these amendments and by a valuable glossary. Prepared principally for the use of officials of military governments, it is one of the best editions of the German Criminal Code that can be found today.

K. L.

The Elements of Roman Law. With a translation of the Institutes of Justinian. By R. W. LEE, D.C.L., F.B.A., Reader in Roman Law of the Inns of Court. Reprinted with corrections 1946 [London: Sweet & Maxwell, Ltd. xxiii and 489 pp. 22s. 6d.].

DR. LEE'S lucid and scholarly Introduction to Roman Law was received with much praise when it first appeared in 1944. It is gratifying to see that its success was such as to require a reprint after only two years. The book must be recommended to all students of Roman Law.

K. L.

Adoption of Children. No. 3 of Oyez Practice Notes, prepared by the Editorial Staff of the Solicitors' Law Stationery Society [London. 1947. 60 pp. 3s. 6d.].

THIS consists of thirty-five pages of clear and systematic exposition of the law and practice, followed by twenty-two pages of Forms and a list of registered Adoption Societies.

R. M. J.

Hapraklit, December, 1945 and January, 1946. Published by the Jewish Bar Association of Palestine, Tel Aviv.

Hapraklit is a Palestinian monthly, in Hebrew, intended for the practitioner with wider interests, each number containing about thirty pages. The numbers under review contain, among other interesting items, notes on recent decisions of English courts; a lecture by Sir Arnold McNair on the effect of the world wars on contracts; and an article by Dr. P. Dikshtein on the latest legislation respecting bigamous marriage. The new rules are the result of harmonious collaboration of the Administration and the Rabbinate, in a field which, owing to the complicated state of Jewish law concerning polygamy, bristles with difficulties.

DAVID DAUBE.

Thomas & Hood Phillips' Leading Cases in Constitutional Law. Eighth edition. By O. HOOD PHILLIPS, M.A., B.C.L.(OXON), of Gray's Inn, Barrister-at-Law, Barber Professor of Jurisprudence in the University of Birmingham [London: Sweet & Maxwell, Ltd. 1947. xxviii and 486 pp. 21s. net].

WE had the pleasure recently (see 9 C.L.J. 411) of welcoming Professor Hood Phillips' *Constitutional Laws of Great Britain, The British Empire and Commonwealth*. The volume under review

is a companion volume to that textbook and is not intended to stand on its own feet. To this end the author has altered the whole treatment of the book in that more space has been given to the judgments and comparatively little to notes on the cases, in place of which there are page references to the author's textbook. The changes in the present volume, both as to content and as to the manner of presentation, are so great that it is in effect an entirely new work. Of the cases appearing in the previous edition of 1934, eighty-five have been discarded, fifty-seven retained and fifty-one fresh cases added, and there is no doubt that the book is the healthier for this drastic pruning and grafting. For example, in the previous edition there were nineteen cases on Treason and twenty on Sedition, Blasphemy and Obscenity, and these are now reduced to the more suitable proportions of four and three respectively.

One important and valuable aspect which is new, is the introduction of cases dealing with the interpretation of statutory powers of public authorities, a matter of increasing interest and importance to the student of constitutional law. That the book has been brought right up to date is illustrated by the inclusion of such cases as *R. v. Bottrill*, *Netz v. Chuter Ede* and *Joyce v. D.P.P.*

We believe the selection of cases to be the most useful yet made available to the student and nothing is gained by suggesting that some cases are omitted unless they are very obvious ones and we have found none. One suggestion only occurs to us which may add to the usefulness of the book—that to the cross-references to cases, a page reference might be added which would save consulting the index of cases each time.

T. C. T.

Private International Law. Third edition. By G. C. CHESHIRE, D.C.L., F.B.A. [London : Geoffrey Cumberlege, Oxford University Press. 1947. lii and 884 pp. 35s. net].

A NEW edition of a standard work is usually the occasion for congratulating the author upon his achievement and for expressing the gratitude of students for having been presented with another excellent book. But a book on Private International Law, even when it reaches a third edition, cannot fail to create a stir, for this branch of law, more than any other, is in constant flux, open to new interpretations and moulded by individual personalities. The new 'Cheshire' exemplifies this. Many parts have been rewritten and much has been added.

A section of the history of English Private International Law is now included. The last vestiges of the doctrine of acquired rights have been excised. The chapter on *renvoi* now embodies the results of Dean Falconbridge's writings, except that Professor

Cheshire wishes to extend *renvoi* to capacity to marry. Secondary characterisation has been retained in its old form although some criticisms have been voiced against the use of this concept. The chapter on the law of corporations has been modified in accordance with Farnsworth's views, but the cases on tax law still occupy much space. The treatment of contracts is considerably expanded and now includes the incorporation of foreign law, but in one place (p. 327) free choice and incorporation of foreign law appear to be confused. Professor Cheshire accepts the rule in the *Vita Food Case*, but he would also approve of *The Torni*. The chapter on torts is rewritten in the light of modern researches. A new approach is suggested in respect of polygamous unions. *Inverclyde v. Inverclyde*, [1931] P. 29 is criticised, but Professor Cheshire recognises that a relaxation in the jurisdictional requirements must make England a Nevada for nullity petitions and must lead to an undesirable increase of foreign decrees which must be recognised in England (but see now *De Reneville v. De Reneville*, [1948] 1 All E.R. 56). The new section on revocation of wills must be welcomed. On the other hand, Professor Cheshire has not been convinced by Mr. Morris' article on the transfer of moveables.

This brief survey of some major alterations introduced in this edition must suffice to illustrate that the book has maintained its reputation for completeness, accuracy and originality.

K. L.

Essays on the Conflict of Laws. By J. D. FALCONBRIDGE, M.A., LL.B., K.C. [Canada Law Book Co., Ltd., Toronto. 1947. xxxi and 730 pp. \$8.00].

STUDENTS of the Conflict of Laws in the British Commonwealth owe an immense debt of gratitude to Dean Falconbridge for the patient labours with which he has surveyed practically the entire field in a steadily growing series of articles. Most of these were published in the *Canadian Bar Review* and the *Dominion Law Reports*, but even if these publications should be at hand, the fact that the articles appeared over a period of twenty years affected their practical usefulness. This defect has now been remedied with the publication of Dean Falconbridge's collected articles. The volume contains all the author's best known essays on *Renvoi* and Characterisation, on Bills and Notes, Contract and Conveyance, Contracts regarding Land, Moveables and Intangibles, Situs and Transfer of Moveables, Marriage, Divorce and Annulment. In addition, all his shorter notes and comments are gathered together. They cover such widely differing subjects in the conflict of laws as the proper law of the contract, illegality by the law of the place of performance, the Frustrated Contracts Act and unjust enrichment, agency, things and interests in things, the mortgagee's

interest in land and succession to such an interest, Lord Kingsdown's Act, conveyance of land by foreign executors, and a number of observations which are of special importance to Canadian and American lawyers.

The articles are arranged in systematic order, and copious cross-references assist the reader. On the other hand, the articles are mostly re-printed in their original form, and thus overlapping and repetitions could not be avoided altogether. The alternative would have been the publication of a book based upon but not reproducing the Dean's previous works, and the present volume has a different aim. It is, as stated before, a most welcome collection of the Dean's valuable contributions to the study of the Conflict of Laws.

K. L.

Chalmers' Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities. Eleventh edition. By FRANCIS RALEIGH BATT, LL.M., a Judge of County Courts, sometime Professor of Commercial Law in the University of Liverpool [London: Stevens & Sons, Ltd. Sweet & Maxwell, Ltd. 1947. xlviii and 364 and (index) 423 pp. 35s. net.].

THE task of editing this classic has been done with great skill, accuracy and thoroughness. Passages have been expanded or inserted to meet the requirements of the student, and the editor has given us the benefit of his valuable opinion on some of the doubtful cases, e.g., p. 266 (effect of 'a/c payee') and p. 55, f.n. 13. The Bills of Exchange Act (1882) Amendment Act, 1932 (crossed banker's drafts) is set out at p. 359, and practically every case reported since the previous edition in 1932 has found a place in the text or footnotes. Among others we note *Wilson and Meeson v. Pickering*, [1946] K.B. 422, C.A. (not negotiable—estoppel); *Bank Polski v. Mulder & Co.*, [1942] 1 K.B. 497, C.A. (general acceptance); *Hibernian Bank v. Gysin & Hanson*, [1939] 1 K.B. 483, C.A. (bill of exchange marked not negotiable); *Cooper v. N. P. Bank*, [1946] K.B. 1 (duty of banker to disclose); *Penmount Estates v. N. P. Bank* (1945), 173 L.T. 344 (crediting proceeds of crossed cheque to an account other than payee's). Reference might perhaps have been made to *Oscar Harris & Sons & Co. v. Vallaman & Co.*, [1940] 1 All E.R. 185, C.A. at p. 101, f.n. 48; *Griffiths v. Dalton*, [1940] 2 K.B. 264 (authority to fill in date on cheque to be exercised within a reasonable time), and to *Rayner & Co. Ltd. v. Hambro's Bank Ltd.*, [1943] K.B. 37, C.A. (confirmed credit). The lay-out of the book has been improved, and we congratulate the editor in enhancing the value of this leading textbook.

T. E. L.

The Law of Succession Testate and Intestate, including the law as to executors and administrators, the administration of assets and the liability of personal representatives for death duties. Second edition. By DAVID HUGHES PARRY, M.A., LL.M., of the Inner Temple, Barrister-at-Law, Professor of English Law in the University of London [London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1947. 1 and 330 and (index) 17 pp. 25s. net].

THE first edition was reviewed in this Journal, vol. VI, p. 492, and we welcome this new edition which has been thoroughly revised and brought up to date. A new chapter has been added on the Inheritance (Family Provision) Act, 1938, and the chapter dealing with the liability of personal representatives for death duties has been considerably expanded. Since the book appeared Part V of the Finance Act 1947 has made changes in the rates of, and exemptions from, legacy and succession duty, and this should be noted by the student. We note references to this Journal at p. 136, n. 4, and that the learned author agrees with the views there expressed on the effect of a devise to A and his children (cf. 1st ed. pp. 124-5). The book is a clear, accurate and thorough account of the subject, and all students will profit by it.

T. E. L.

Law Reports of Trials of War Criminals. Selected and Prefaced by the United Nations War Crimes Commission. English edition, Vol. 1 [London: H.M.S.O., 1947. xl and 127 pp. 2s. 6d. net].

THIS volume, the first of a series which has now grown large, contains the reports of nine trials of War Crimes by members of the armed forces of the late enemy. It is unnecessary to describe the incidents of the trials included—the Essen Lynching Case is one—as they are mostly still fresh in the public mind. It is sufficient to note the value of the series as a source of international law, which must, despite a perhaps excessive amount of editing and annotating, be very high.

C. P.

The International Law Quarterly. The British Journal of Public and Private International Law. Vol. 1. No. 1. Spring 1947 [London: Stevens & Sons, Ltd., 152 pp. 10s. annual subscription, 30s. net].

THOSE who are interested in International Law, or the future of mankind on earth, will welcome this new *Quarterly* under the able

editorship of Professor Cheshire and Dr. Colombos assisted by a learned array of legal luminaries on the editorial committee. If sincerity, good will, learning and understanding can help towards peace, then this publication has a leading part to play in the affairs of nations. Sir Cecil Hurst in his Foreword notes the tendency to regard International Law as a topic for experts, and states that one object of the *Quarterly* is to 'bring home to a wider section of the community the part which International Law has to play in the modern world', to make its rules understood and to strengthen the international forces that make for justice through law. Furthermore, the increasing intercourse between the States of Europe will demand a better understanding of their respective legal systems particularly in relation to marriage, citizenship, domicile and inheritance. In this Conflict of Laws the practitioner will find an invaluable guide. The leading articles are: International Law in Practice, by Sir Arnold McNair (Judge of the Court of International Justice at the Hague); Plea for a Wider Study of Private International Law, by Professor Cheshire; The United Nations Charter by Dr. Colombos. There are valuable editorial notes on (*inter alia*) the International Court of Justice, New Codification of International Law, Validity of Foreign Divorce Decrees and the Polar Regions and International Law. There are reviews of cases and books and a collection of selected documents.

T. E. L.

Annuaire Suisse de droit international (*Schweizerisches Jahrbuch für internationales Recht*). Published by the Société Suisse de droit international. [Zurich: Polygraphischer Verlag A.G. Vol. 1, 1944, 314 pp.; Vol. 2, 1945, 304 pp.].

THIS new Yearbook of International Law has a dual aim: to present the Swiss view on problems of public and private international law, and to acquaint Swiss readers with those questions of international law which concern Switzerland. In this purpose the new publication has succeeded admirably.

Leading articles are contributed by Professor Huber on the Red Cross Organisation and by Prof. Sauser Hall on the law of belligerent occupation. The latter article is particularly instructive inasmuch as it gives a survey of German practice and literature during the second World War. Prof. Guggenheim discusses collective security in the light of Swiss neutrality. An excellent account of the work of the Hague Conferences on Private International Law is given by Professor Gutzwiller. Other sections of the volumes contain surveys of the decisions of Swiss tribunals in the sphere of public and private international law, including jurisdiction, tax and administrative law. Each of these sections is supplemented by a report on Swiss legislation and literature.

The contributions are uniformly of high quality and the new publication must be welcomed as a worthy addition to the literature on public and private international law.

K. L.

Cases on Equity. Second edition. By ZECHARIAH CHAFEE, JR. and SIDNEY POST SIMPSON. In collaboration with John P. Maloney [Chicago: The Foundation Press, Inc. 1946. xxii and 1276 and (index) 36 pp. \$8.00].

THIS volume in the University Case Book Series replaces the two-volume edition of 1934 and is designed primarily to provide materials for a one year course in Equity in American Law Schools. Not only does this book provide ample evidence of the common source of our learning on this subject, but it also reflects the common cause in which, of recent years, we and our friends across the Atlantic have been united, for the authors tell us that 'it is issued at this time to meet the needs of students, mostly veterans, entering law school in 1946'. Though the technique of case-book teaching is one with which we are not all familiar, we are sure that to our own students and teachers of Equity this volume will prove as useful and stimulating as its predecessors, providing, as it does, ample evidence of the value of a separate course of study of Equity.

Much of the content of the book is already familiar ground to us; it begins (as any book on Equity must needs do) with a ten-page extract from Maitland's *Equity*, and the reader soon finds himself among such old established friends as *Penn v. Lord Baltimore*, *Lumley v. Wagner*, and *Lawes v. Bennett*. And even if his friendship with these is rather strained, he will find that the authors have used their materials in such a way that his interest cannot fail to be maintained. Our interest in *Tulk v. Moxhay*, for example, is revived when we learn that the piece of land in Leicester Square around which the legal battle was fought, had seen earlier and more interesting conflicts for 'it was a favourite duelling ground under the Stuarts and a French midwife was burned there in 1688 for murdering her husband'. The illustration of that plot (at p. 374) complete with its railings and in 'neat and ornamental order', cannot but induce the student to pursue his studies. Nor could he resist reading *Levinson v. Shaw* (at p. 1242) when he finds the defendant none other than the author of 'Arms and the Man' and that the allegation is that the operetta 'The Chocolate Soldier' is an infringement of that famous play. And when the authors suggest that a particular chapter on Specific Performance might well be entitled 'The History of an Inadvertent Error; the Rise, Decline and Vestigial Survival of Fry's Doctrine of Mutuality of Remedy', we reflect that our own masters in

Equity are not without a lightness of touch for Dr. Hanbury makes Fry's rule say, with Lucio, 'I am a sort of burr; I shall stick'.

It is not only the method of presentation of the subject-matter which is so valuable; the exhaustive references to articles in English and American law journals and the formulation of problems on each topic make the book a mine of information for the teacher. So much as we have been able to read thus far we have enjoyed and profited by, and if we must pause here it is but to offer our thanks and congratulations before proceeding further.

T. C. T.

The Law relating to Hospitals and Kindred Institutions. By S. R. SPELLER, LL.B., of Lincoln's Inn, Barrister-at-Law [London : H. K. Lewis & Co., Ltd. 1947. xxxv and 386 and (index) 13 pp. 22s. 6d. net].

THIS book, which includes the author's law for nurses, has been written primarily for hospital administrators and others who work in hospitals in any capacity, professional or otherwise. The author makes it clear that it is not intended to be a reference book for members of the legal profession. Even so, he has had considerable experience in the legal problems relating to hospitals, and a book from his pen deserves careful attention. He is secretary and director of education of the Institute of Hospital Administrators and also editor of *The Hospital*.

The administration of hospitals and allied institutions covers almost the whole field of human relationships. In addition to the general powers and duties of hospital authorities, there are the relationships between hospitals and their staffs and between the staffs and the patients. There are in addition many special branches, *e.g.*, insurance, the Factories Acts, the Pharmacy and Poisons Acts, questions relating to compensation, and even the Road Traffic Acts. All these have important repercussions in the field of hospital work.

One of the main characteristics of the present century has been the increasing tendency of the State to intervene in the personal health services. The Lunacy and Mental Treatment Acts and the Mental Deficiency Acts, the Public Health Acts, the Midwives Acts and the Nurses Act, all affect hospital work, but it is in the social legislation of the past few years that the intervention of the State in medicine is most clearly seen. The Education Act of 1944, the National Insurance Act, the legislation relating to disabled persons and the Poor Law Bill at present before Parliament, have as a common denominator a comprehensive health service. This is provided by the National Health Service Act which will have profound results on the present arrangements for the medical care of the people both in their own homes and in hospital.

Much of the law so carefully discussed by Mr. Speller in his book

will be superseded in the near future by this Act. This applies particularly to Part 1 of the book dealing with the definition, constitution and powers of hospital authorities. After the appointed day under the National Health Service Act, much of the present law will continue to relate only to nursing homes run for profit and a small minority of hospitals and institutions not included in the National Health Service.

Part 1 of the book must, therefore, be read in conjunction with Part 5, which describes the National Health Service Act. Already some aspects of the National Health Service as set out in the original White Paper and in the Debates in Parliament are undergoing modification, and it is unfortunate that the book was produced before any of the regulations dealing with the detailed administration of the new service had appeared. For this reason the description of the Act can only be a general one. Even so, it is a useful guide but the table setting out in diagrammatic form the administrative tiers of the Health Service has some omissions. For example, the duties of the Regional Hospital Boards do not end in the provision of in-patient facilities and out-patient clinics. Each Regional Hospital Board has the important responsibility to ensure an adequate specialist service for the region. This must include the provision of consultants in medicine, surgery and allied specialties to work in the hospitals, clinics and, if the patient is unfit to travel, the home. The Regional Hospital Boards must also make provision for such highly specialised units as thoracic surgery, neuro-surgery, plastic surgery and the diagnosis and the treatment of cancer.

The duties laid on local health authorities under section 28 of the Act relating to the prevention of illness and care and after-care of sick persons are not clearly shown. The Minister of Health has so far only issued directions under this section concerning the care and after-care of the tuberculous. But many local health authorities will interpret this section widely, and under it may make provision for the supply of various home comforts and in particular the supply of nursing requisites for the Home Nursing Service.

Part 2 of the book deals with the general relationship between the patient and the hospital and is admirably set out and clearly written. The discussion on the general principles for deciding liability must now be read in the light of the decision in *Collins v. Hertfordshire County Council*, [1947] K.B. 598.

The author was clearly in two minds whether to publish this book now or wait until the National Health Service had been in existence for a little while. He proposes to bring out a companion volume later. The present book provides a useful exposition of the principles of the present law relating to hospitals for hospital workers.

A. LESLIE BANKS.

The Justices' Handbook. A guide to law, evidence and procedure in Magistrates' Courts. By J. P. EDDY, K.C., Recorder of West Ham, with a Foreword by the Right Hon. LORD OAKSEY [London: Stevens & Sons, Ltd. 1947. xvi and 128 and (appendices, tables of cases, statutes and index) 21 pp. 7s. 6d. net].

THIS is a small practical handbook in which the lay magistrate may find an outline of the law he has to administer and guidance on the rules of evidence and procedure. Among other matters, chapters are devoted to fundamental principles in the administration of justice and features of criminal law and practice; definitions of some offences; commencement of proceedings; arrest; summons; rules of evidence; procedure in criminal cases; bail; Poor Persons' Defence Act, 1930; probation and punishment; juvenile courts; domestic proceedings; affiliation proceedings; liquor licensing; appeals; non-judicial duties of justices, and a list of ministers and organisations concerned with magistrates' courts. It should be of invaluable assistance to every new magistrate, for it will give him a real approach to the issues he has to decide, whether of law or of fact, and 'insure so far as possible the due administration of justice'.

T. E. L.

Privacy and the Press. The Daily Mirror Press Photographer Libel Action. Lea v. Justice of the Peace, Ltd. and R. J. Acford, Ltd. Edited with an introduction by H. MONTGOMERY HYDE, of the Middle Temple, Barrister-at-Law [London: Butterworth & Co. (Publishers) Ltd. 1947. v and 250 pp. 6s. net].

A DAILY MIRROR photographer entered a private house uninvited, and although he had been told not to do so, took a photograph of the wedding reception held there. The bridegroom assaulted the photographer and damaged his camera. For this he was prosecuted at Bow Street Police Station. *The Justice of the Peace* made a critical comment on the incident and were sued for libel by the photographer. The defendants pleaded justification and fair comment and judgment was given in their favour. This book gives a verbatim report of the libel action which deals with matters of considerable interest to lawyers and laymen, particularly the so-called right of the Press to intrude upon the lives of private persons.

The Conveyancers' Year Book, 1946. Vol. 7. Editor: R. E. MEGARRY, of Lincoln's Inn, Barrister-at-Law; Contributors: B. G. BURNETT-HALL, of Lincoln's Inn, Barrister-at-Law; MICHAEL BOWLES, of Gray's Inn and the Inner Temple, Barrister-at-Law; K. J. T. ELPHINSTONE, of Lincoln's Inn and the Inner Temple, Barrister-at-Law; and C. A. NEWPORT, F.C.R.A. [London: The Solicitors' Law Stationery Society, Ltd. 1947. xxxii and 232 and (index) 20 pp. 25s. net].

THIS volume maintains the accuracy and thoroughness we have come to associate with the *Year Book*. The whole series of reports, Irish, Scottish and English have been scrutinised, and the income tax section has been considerably enlarged. Statutes and statutory rules and orders, and conveyancing articles in periodical literature have been summarised. Every section is comprehensive and clear, and nothing has been spared to ease the work of the practitioner. The perplexing question of what is a charity is discussed in the light of seven decisions at pp. 11-16; *Hickman v. Peacey*, [1945] A. C. 304, is given the importance it deserves at pp. 118-120; the prolific offspring of the Rent Acts are dealt with in a masterly way at pp. 138-161; *Re Wakeman*, [1945] Ch. 177, and the literature to which it has given rise appear at pp. 119-120, and the interesting case of *British General Insurance Co., Ltd. v. Att.-Gen.*, [1945] L.J.N.C.C.R. 113, is summarised at pp. 7-8. We note with regret that this is the last volume under the editorship of Mr. Megarry, but with him we agree, that the success of the next volume under the editorship of Mr. Montgomery White, K.C., is already guaranteed.

T. E. L.

The Conveyancers' Year Book, 1947. Vol. 8. Edited by C. MONTGOMERY WHITE, of Lincoln's Inn, one of His Majesty's Counsel, assisted by E. D. RENWICK, of Lincoln's Inn, Barrister-at-Law [London: The Solicitors' Law Stationery Society, Ltd. 1947. xxxvi and 264 and (index) 22 pp. 25s. net].

It is gratifying to note that the delay in production has been, and is to be, further reduced, for this *Year Book* has become indispensable to all concerned with Property and Conveyancing. The all-important nationalisation schemes dealing with the Bank of England, Coal and Health Service, and the clutter of legislation interfering with the rights of landowners and enabling government departments to acquire land compulsorily, loom large in this issue. There is an admirable summary of the National Health Service Act, 1946, at pp. 155-165; The Rent Restrictions Act and Landlord and

Tenant take thirty pages each, a fresh crop of cases as to the meaning of 'charity' covers five pages, and Income Tax takes fourteen pages. The whole series of reports and legal literature have been analysed, and this number maintains the high reputation of its predecessors.

T. E. L.

Books also received :—

The Rent Acts. Third edition. By R. E. MEGARRY, M.A., LL.B., of Lincoln's Inn, Barrister-at-Law. London : Stevens & Sons, Ltd. 1947. xxii and 213 and (index) 8 pp. (15s. net).—The second edition of this book (reviewed in the C.L.J. 1947, vol. ix, p. 387) went out of print in six months; the two parts now appear in a single volume. The text has been thoroughly overhauled, practically re-written, and brought up to date—May 22, 1947. Mr. Megarry is one of the few masters of these 'difficult and embarrassing Acts' and their prolific progeny of complicated case-law. A tremendous amount of work has gone into this edition, and whatever problem may arise, the practitioner will find the lines of the solution in this admirable book.

Hill and Redman's Complete Law of Landlord and Tenant. First Supplement to Ninth Edition. By W. J. WILLIAMS, Esq., B.A. of Lincoln's Inn, Barrister-at-Law, and Miss M. M. WELLS, M.A., (Cantab.) of Gray's Inn, Barrister-at-Law. London : Butterworth & Co. (Publishers), Ltd. 1948. x and 46 pp. (5s. net, Main work and Supplement, 63s. net).—This contains all the developments up to July, 1947, in case law, statutes and emergency legislation. There are also annotations to the Hill Farming Act, 1946, and the Agriculture Act, 1947.

The Death Duties. By ROBERT DYMOND, assisted by R. K. JOHNS, Second (Consolidated) Supplement to the 10th edition [London. 1948. Solicitors' Law Stationery Society, Ltd. 48 pp. 3s. 6d. 10th edition and Supplement 55s. net]. Incorporates recent judicial decisions; alterations in death duties under the Finance Acts, 1946 and 1947; and the conventions against double death duties made with the United States of America, Canada and South Africa; and summarises the relevant provisions of the Crown Proceedings Act, 1947.

University of Queensland Papers. Australian Contributions to the Evolution of Parliamentary Government. By THOMAS PENBERTHY FRY, E.D., M.A., B.C.L., SC.JUR.D., of Gray's Inn, Barrister-at-Law, and of the Supreme Court of Queensland. Senior Lecturer

in the University. Vol. 1, No. 1. [Published as an original paper by the University of Queensland. 1947. 21 pp. 3s. net]. This pamphlet makes it clear that parliamentary government in all its features is not identical in Australia, the United Kingdom, and in other parts of the British Commonwealth. Important divergencies, both past and present, are pointed out, for example, in connection with the doctrine of the sovereignty of Parliament Australia has developed the doctrine of Judicial Review, which in effect means that the courts sometimes have the power to decide whether legislation is, or is not, to be operative. Other matters which are clearly explained are the Cabinet System, the Australian Loan Council, the exercise of Commonwealth Legislative Powers by State Premiers, Bicameral and Unicameral Legislatures, and the functions, structure, procedure, practices and privileges of the Australian Parliaments. The paper is full of interest and instruction.

Law Notes Year Book, 1947. By the Editors of *Law Notes*, London: The *Law Notes* Publishing Offices. 1947. xxiv and 128 and (index) 7pp. (7s. 6d. net.)—The earlier series was discontinued in 1932, and this is the first of a new annual series, designed to give the practitioner and student a digest of cases and statutes for the year. It covers the main developments from June, 1945, to December, 1946 and like all *Law Notes* publications is accurate and well done.

California Law Review. Vol. 35. 1947. Part 4. (\$4.00 per year.)—The leading articles are, *Four Years of the Rules on Appeal*, by B. E. Witkin; *How Courts Interpret Regulations*, by Frank C. Newman.

University of Toronto Law Journal. Vol. VII. No. 1. 1947. Edited by PROFESSOR W. M. P. KENNEDY, Dean of the School of Law.—The leading articles are: *Gilbert de Thornton's Summa de Legibus*, by S. E. Thorne; *War Criminals and the Law of the United Nations*, by F. B. Schick; *The Canadian Citizenship Act, 1946*, by George T. Tamaki; *Copyright in Relation to the Crown and Universities with Special Reference to Canada*, by Harold G. Fox; *Sixteenth-Century Treatises for Justices of the Peace*, by B. H. Putnam; *Treason and the Trial of William Joyce*, by S. C. Biggs; *An Early Thirteenth-Century Register of Writs*, by Elsa de Haas; *Stone on Jurisprudence*, by Cecil A. Wright; *Survey of Canadian Legislation*, by Bora Laskin; J. B. Milner; D. M. Treadgold; E. W. Rowat; E. F. Whitmore.

Law Reports of Trials of War Criminals. Selected and prepared by the United Nations War Crimes Commission. Vol. II. The

Belsen Trial. London. 1947. Published for the United Nations War Crimes Commission by His Majesty's Stationery Office. xii and 156 pp. (including Index). (3s. net.)—This volume is the work of Mr. George Brand, LL.B., who was the Legal Officer of the Commission, and Lord Wright contributes a Foreword. Part I gives an outline of the proceedings (125 pp.) and Part II contains invaluable notes on the case. (30 pp.)

Le Droit polonais au service de la paix dans la lutte contre les criminels de guerre (Rapports présenté au Congrès International des juristes-democrates et à l'Association Internationale de droit penal). [Publications du Service Polonais pour la recherche des criminels de guerre. 1947. 58 pp.]. This contains articles on war crimes by Dr. Marian Muozkat and Jerzy Sawicki.

Review of Polish Law. Vol. I. No. 1. 1947. Edited by DR. RUDOLF LANGROD and published by the Ministry of Justice and organised and launched by the Foreign Relations Dept., Warsaw.—We welcome the appearance of this new quarterly whose object is to make known to people of foreign countries 'the topics and spirit of the new legislation in Poland, in the spheres of public, economic and cultural life, and covering public, private and administrative law'.

Tolstoy's Law and Practice of Divorce and Matrimonial Causes. First Supplement (to December 1, 1947). By D. TOLSTOY, of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1947. viii and 100 pp. (7s. 6d.).—Although the present work only appeared in 1946, the Supplement contains the substance of some one hundred and twenty additional cases which take up forty-five pages of the text. The remainder sets out the Matrimonial Causes Rules, 1947 (as amended by the Matrimonial Causes (Amendment) Rules, 1947); Order 58, Rule 8A, and the Matrimonial Causes (Amendment) (No. 2) Rules, 1947.

The Execution of a Judgment, including other methods of enforcement. By J. F. JOSLING, Solicitor of the Supreme Court. London: The Solicitors' Law Stationery Society, Ltd. 1948. 61 pp. (3s. 6d. net.)—This is No. 4 of 'Oyez Practice Notes' which serve the very useful purpose of providing practitioners with a convenient and up-to-date statement of the law on topics and questions which constantly arise, but the solutions to which are either inaccessible or not adequately dealt with elsewhere. This is a comprehensive and clear account of the entire procedure against the individual, the corporation and the Crown.

Law Reform Now. A Programme for the Next Three Years. By a Committee of the Haldane Society. London: Victor Gollancz, Ltd. 1947. 32 pp. (9d. net.)—This pamphlet makes an

unanswerable case for reform in the law relating to employer and workmen, landlord and tenant, married women, criminal law and punishment, divorce procedure, magistrates, land transfer, administration of the courts—practice and procedure and legal aid in general. Some of the suggestions have already been incorporated into bills, e.g., the abolition of the doctrine of common employment.

A Concise Law Dictionary for Students and Practitioners. Third edition. By P. G. OSBORN, LL.B.(Lond), of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1947. v and 359 pp. (17s. 6d. net.)—This useful dictionary has been revised to the end of 1946, and the work has been well done. The learned author in his preface quotes from our review of the second edition (C.L.J., Vol. 6, p. 490). Much new material has been added, and it is 'an accurate and an extremely convenient reference book'.

Poetic Justice. By J. P. C. Illustrated by LESLIE STARKE. London: Stevens & Sons, Ltd. 1947. xii and 79 and (index) 5 pp. (6s. net.)—A first-class investment and an excellent tonic; the verses are delightfully amusing; so are the illustrations and the Question Paper. We look forward to more of them.

Sykes's Banking and Currency. Ninth edition. By ERNEST SYKES, B.A.(Oxon), Honorary Secretary of the Institute of Bankers, with an introduction by the late F. E. STEELE. London: Butterworth & Co. (Publishers), Ltd. 1947. xiv and 238 and (index) 7 pp. (8s. 6d. net.)—This well-known textbook which appeared first in 1904 is designed for those reading examinations held under the auspices of the Institute of Bankers and the London Chamber of Commerce. Chapters XII to XX contain much useful information for the law student.

'*This is the Law*' Series. London. Stevens & Sons, Ltd. 1947. (4s. each.)—

Income Tax. By C. N. BEATTIE, LL.B., of Lincoln's Inn, Barrister-at-Law. vi and 110 and (tables and index) 7 pp.

Trade Marks and Unfair Competition. By T. A. BLANCO WHITE, Barrister-at-Law. ix and 72 and (table of cases and index) 4 pp.

Patents and Registered Designs. By T. A. BLANCO WHITE, of Lincoln's Inn, Barrister-at-Law. ix and 70 and (table of cases and index) 4 pp.

Hire-Purchase Law. By MAURICE SHARE, B.A., of Gray's Inn and the North Eastern Circuit, Barrister-at-Law. vii and 100 and (index) 11 pp.—Here are four books on admittedly difficult topics, written primarily for the layman and the business man; they all show an unusual ability to combine a clear explanation with accuracy. Law students will find them very useful for there is

ample reference to authorities. We congratulate the three learned authors upon making such complex subjects clear, and interesting to read.

Where to Look for Your Law. Tenth edition. By R. HILARY STEVENS. London: Stevens & Sons, Ltd. 1948. 285 pp. (5s. interleaved 7s. 6d. net.)—This is a very useful guide to current law books arranged alphabetically under subjects and authors and the prices are quoted. A complete list is given of current law reports, periodicals, and a selection of Dominion, Colonial and Foreign law books and reports.

The Progressive Development of International Law. By HERBERT W. BRIGGS, Professor of International Law at Cornell University. Lectures given at the Faculty of Law of Istanbul in the year 1946-7. Publications of the Turkish Institute of International Law No. 4. The lecture is printed in Turkish and in English.

Michigan Law Review. Vol. 46. Nos. 1 and 2. 1947. No. 3. 1948. Published monthly November-June, at Ann Arbor, Michigan Law School, University of Michigan. (\$1.00 per number, \$5.00 a year.)—Articles include (in No. 2) 'Justice Johnson, Jurist in Limine: the Judge as Historian and Maker of History', by A. J. Levin; and Comments on Precedent Debt as Consideration, Impracticality of Performance, Rights of Finders; also (in No. 3) 'General Aspects of Michigan Community Property Law', by William E. Burby; 'Pooling and Utilisation of Oil and Gas Undertakings', by A. Allen King; 'Application of the Law of Absent Sovereign in Territory under Belligerent Occupation: The Schio Massacre', by Eric Stein; and Comments on Due Process and the Bill of Rights, Privileges and Immunities of United Nations Delegates and Officials, Liability of Labour Union for inducing Breach of Contract, and on Quasi-Contract (impossibility of performance—restitution where further performance has been excused).

The Law Quarterly Review. Vol. 64. January, 1948. Editor: A. L. GOODHART, K.C., D.C.L., LL.D., Professor of Jurisprudence in the University of Oxford. London: Stevens & Sons, Ltd. (7s. 6d., annual subscription 25s.)—The leading articles are 'Equity and Quasi-Contract', by Professor P. H. Winfield; 'What is a Licence?', by H. W. R. Wade; 'The Delictal Responsibility of Medieval Corporations', by Walter Ullmann; 'The Subjects of the Law of Nations (II)', by Professor H. Lauterpacht. In addition there are invaluable notes of cases and book reviews.

Rayden on Divorce. Fourth edition. Noter-up to Special Supplement. Matrimonial Causes (Amendment) Rules, 1947. London: Butterworth & Co. (Publishers), Ltd. Issued free. 6 pp.

Revista Juridica de la Universidad de Puerto Rico. Vol. XVI. No. 3. 1947. (\$3.00 a year.)

Informacion Juridica. Ministerio de Justicia Comision de Legislacion Extranjera. Nos. 48, 52, 55, 1947 : No. 57, 1948.

World Affairs. The London Institute of World Affairs. Vol. I. (New Series). No. 2, April, 1947; No. 3, July, 1947. Vol. II. No. 1, January, 1948. Edited by GEORGE W. KEETON and GEORGE SCHWARTZENBERGER. London : Stevens & Sons, Ltd. (2s. 6d. per number.)

The Bankruptcy Act of 1898 as Amended with Annotations. Second edition. By JOHN HANNA, Professor of Law, Columbia University, and JAMES A. McLAUGHLIN, Professor of Law, Harvard University. Brooklyn : The Foundation Press, Inc. 1947. iv and 395 pp. (\$2.00, distributed gratis as a supplement to the authors' Casebook on Creditors' Rights. Third edition).

Company Law Amendment, 1929-1947. A comparison, in sections for easy reference, of the Companies Acts. Prepared for the Chartered Institute of Secretaries by A. T. Purse, LL.B., A.C.I.S. Cambridge : W. Heffer & Sons, Ltd. 38 pp. (2s. 6d. net.)

Torts in Private International Law. By PROFESSOR R. R. KURATOWSKI of the Polish Bar and of Lincoln's Inn, Barrister-at-Law. Reprinted from the *International Law Quarterly*, Summer, 1947. Stevens & Sons, Ltd.

The Lawyer's Companion and Diary for 1948. Part I. Edited by ERNEST L. BUCK; Part II, edited by L. C. E. TURNER. London : Stevens & Sons, Ltd. and Shaw & Sons, Ltd. xxv and 981 pp.—This useful annual is now in its one-hundred-and-second year of publication. It contains a mine of miscellaneous information on matters of practice and is up to date; it is in every way a desirable companion to the busy practitioner. Part II is a complete Law List.

Temple Law Quarterly. Vol. XX, Nos. 3 and 4, 1947; Vol. XXI, Nos. 1 and 2, 1947, and No. 3, 1948. (\$3.00 a year.)—Leading articles of interest to us are :—No. 4. Doctrine of Stare Decisis and the Extent to which it should be applied, by Hon. Henry Ellenbogen; Licensee Estoppel in Patent Law, by Morris D. Forkosh; Juvenile Delinquency in Philadelphia and Economic Trends by J. Otto Reinemann; No. 1. Letters from a Judge to his Lawyer Son, by Hon. Horace Stern; Proposed Innovation in Civil Procedure, by Hon. Walter W. Rice; Ex post Facto from Rome to Tokyo, by Gordon Ireland; No. 2. Judging is also Administration, by Hon. Harold H. Burton; Case Records of Hospitals and Doctors as Evidence under the Business Records Act, by Hon. Walter Braham;

Sales and the Uniform Written Obligations Act, by Charles C. Arensberg. There are the usual notes on recent cases, legislation and book reviews.

Snell's Principles of Equity. Twenty-third edition. By R. E. MEGARRY, M.A., LL.B., of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1947. cxxiv and 606, and Index 27 pp. (37s. 6d. net.)

The British Year Book of International Law, 1946. Oxford University Press. 1947. vii and 535 pp. (42s. net.)

The Companies Act, 1947. By S. W. MAGNUS, B.A., of Gray's Inn, Barrister-at-Law, and MAURICE ESTRUI. (Reprinted from Butterworth's Annotated Legislation Service.) London: Butterworth & Co. (Publishers), Ltd. 1947. iii and 450 pp. (21s. net.)

The Government of Canada. By ROBERT MCGREGOR DAWSON, M.A., D.SC. (Econ.), Professor of Political Economy; University of Toronto. University of Toronto Press. 1947. x and 662 pp. (\$5.50 net.)

Probate and Divorce Handbook. Second edition. By D. PERRONET REES, District Probate Registrar, Birmingham. London: Butterworth & Co. (Publishers), Ltd. 1948. xlviii and 402 and (index) 439 pp. (27s. 6d. net.)

An Introduction to the Criminal Law in Australia. By J. V. BARRY, K.C., and G. W. PATON, M.A., B.C.L., assisted by G. SAWER, LL.M. Preface by Professor P. H. Winfield, K.C., LL.D., F.B.A. English Studies in Criminal Science. Edited for Department of Criminal Science, Faculty of Law, University of Cambridge. Edited by L. Radzinowicz and J. W. C. Turner. London: Macmillan & Co., Ltd. 1948. x and 120 and (index) 128 pp. (10s. 6d. net.)

The Journal of Criminal Science. Vol. I. A collection of papers issued from time to time under the auspices of the Department of Criminal Science, Faculty of Law, University of Cambridge. Edited by L. Radzinowicz, M.A., LL.D., and J. W. C. Turner, M.C., M.A., LL.B. London: Macmillan & Co., Ltd. 1948. 207 pp. (15s. net.)

A Textbook of International Law. General Part. By ALF ROSS, LL.D., PH.D., Professor of International Law in the University of Copenhagen. Introduction by J. L. BRIERLY, O.B.E., D.C.L., Professor of International Law and Diplomacy in the University of Oxford.

The Agriculture Act, 1947. By ANTHONY CRIPPS, Esq., D.S.O., T.D., M.A., of the Middle Temple and Midland Circuit, Barrister-at-Law. (Reprinted from Butterworth's Annotated Legislation Service.) London: Butterworth & Co. (Publishers), Ltd. vi and 213 and (index) 229 pp. (21s. net.)

Lawyers, Law Schools and The Public Service. By ESTHER LUCILE BROWN, Director, Department of Studies in the Professions, Russell Sage Foundation. New York. 1948. 238 pp. (\$3.00 net.)

An Introduction to Criminal Law. By RUPERT CROSS, M.A., B.C.L., Solicitor, Lecturer at Magdalen College, Oxford, Tutor to the Law Society's School of Law, and P. ASTERLEY JONES, LL.B., M.P., Solicitor, Tutor at the Law Society's School of Law. London: Butterworth & Co. (Publishers), Ltd. 1948. xliii and 322 and (index) 24 pp. (21s. net.)

The Law of Savings Banks. Government Annuities and Savings Certificates. Third edition. By JOH. Y. WATT, late of the National Debt Office and Ministry of Health, with a preface by JAMES R. FIDDES, C.B.E., J.P. London: Butterworth & Co. (Publishers), Ltd. 1948. Vol. 1: Text. lxxi and 330 and (index) 61 pp. Vol. 2: Appendix. vii and 329 pp. (63s. net.)

Great Britain and the United States and the Future. By J. E. TYLER, Senior Lecturer in Modern History in the University of Sheffield. Published under the auspices of The London Institute of World Affairs. London: Stevens & Sons, Ltd. 1947. xi and 128 and (index) 2 pp. (8s. net.)

Middle Temple Ordeal. Being an account of what World War II meant to the Inn, with an appendix of dates and events. Foreword by the Hon. Mr. Justice CASSELS, Master Treasurer of the Honourable Society of the Middle Temple, 1947. Privately printed for the Society by Sir Isaac Pitman & Sons, Ltd. 1948. 55 pp.

Criminal Law. Special reference to Hebrew Law and the present Law of Palestine. Vol. 2. By P. DIKSHEIN, Lecturer on Criminal Law, School of Law and Economics, Tel-Aviv. Palestine. 1947. 466 pp. (No price given.)

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